2.

SUPREME COURT OF THE UNITED STATES.

No. 362.

JOHN EDGAR THOMPSON ET AL., COMPLAINANTS,

vs.

THE UNION PACIFIC RAILWAY COMPANY, EASTERN DIVISION, JOHN M. FUNK, JAMES BLOOD, AND WILLIAM A. COY, DEFENDANTS.

CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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1 Pleas before the Honorable Samuel F. Miller and Mark W. Delahay, judges of the circuit court of the United States of America for the district of Kansas, at a term of said court begun and held at the city of Topeka, in and for said district, on Monday, the 25th day of May, 1868.

JOHN EDGAR THOMSON *et al.*, comp'ts,
vs.
THE UNION PACIFIC RAILWAY COMPANY, EASTERN DIVISION, JOHN M. FUNK, JAMES BLOOD, WILLIAM A. COY, defendants. } 108.

Be it remembered, that on the 26th day of March, A. D. 1867, John Edgar Thomson et al., complainants in said cause, filed in the clerk's office of the circuit court of the United States for the district of Kansas, their bill of complaint herein, which is in words and figures as follows, to wit:

2 To the judges of the circuit court of the United States, in chancery sitting, for the district of Kansas.

John Edgar Thomson, of Philadelphia, citizen of the State of Pennsylvania, John McManus, of Reading, citizen of the State of Pennsylvania, Matthew Baird, of Philadelphia, citizen of the State of Pennsylvania, Edward Miller, of Philadelphia, citizen of the State of Pennsylvania, William Dennison, of Columbus, citizen of the State of Ohio, Thomas L. Jewett, of Steubenville, citizen of the State of Ohio, George W. McCook, of Steubenville, citizen of the State of Ohio, William H. Clement, of Cincinnati, citizen of the State of Ohio, George H. Pendleton, of Cincinnati, citizen of the State of Ohio, Alfred Gaither, of Cincinnati, citizen of the State of Ohio, Carlos S. Greeley, of St. Louis, citizen of the State of Missouri, Giles F. Filley, of St. Louis, citizen of the State of Missouri, James Archer, of St. Louis, citizen of the State of Missouri, Samuel T. Glover and James Shepley, of St. Louis, citizens of the State of Missouri, Samuel M. Edgell, of St. Louis, citizen of the State of Missouri, Oliver D. Filley, of St. Louis, citizen of the State of Missouri,
3 John P. Usher, of Terre Haute, citizen of the State of Indiana, bring this their bill against the Union Pacific Railway Company, eastern division, citizens of the State of Kansas, a company incorporated in the name of the Leavenworth, Pawnee, and Western Railroad Company, by the governor and legislative assembly of the Territory of Kansas, and now existing under the constitution and laws of the State of Kansas, in said State, and building and operating the Union Pacific railway, eastern division, through said State, and the act of Congress entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and the several acts of Congress amendatory thereof, John M.

Funk, of Wyandotte, and a citizen of the State of Kansas, William A. Coy, of Oskaloosa, a citizen of the State of Kansas, and James Blood, of Lawrence, a citizen of the State of Kansas; and thereupon your orators complain and say, that they, the said John Edgar Thomson, is the owner of eleven hundred and sixty-three
4 shares of the capital stock of the said railway company, the said John McManus is the owner of ten hundred and fifty-nine shares of the capital stock of said railway company, the said Matthew Baird is the owner of twenty-one hundred and fifteen shares of the capital stock of said railway company, the said Edward Miller is the owner of four hundred and twenty-three shares of the capital stock of said railway company, the said William Dennison is the owner of two hundred and twelve shares of the capital stock of the said railway company, the said Thomas L. Jewett is the owner of three hundred and ninety-two shares of the capital stock of said railway company, the said George McCook is the owner of six hundred and sixty-seven shares of the capital stock of said railway company, the said William H. Clement is the owner of two hundred and twelve shares of the capital stock of said railway company, the said George H. Pendleton is the owner of one hundred and six shares of the capital stock of said railway company, the said Alfred Gaither is the owner of two hundred and seventy-five shares of the capital stock of said
5 railway company, the said Carlos S. Greeley is the owner of twenty-one hundred and eighteen shares of the capital stock of said railway company, the said Giles F. Filley is the owner of twenty-four hundred and seventy-eight shares of the capital stock of said railway company, the said James Archer is the owner of ten hundred and fifty-nine shares of the capital stock of said railway company, the said Samuel T. Glover and James Shepley are the owners of four hundred and twenty-three shares of the capital stock of said railway company, the said Samuel M. Edgell is the owner of fifteen hundred and twenty-five shares of the capital stock of said railway company, the said Oliver D. Filley is the owner of five hundred and thirty shares of the capital stock of said railway company, the said John P. Usher is the owner of four hundred and twenty-four shares of the capital stock of said railway company, all of which are of the value of more than fifty thousand dollars, and that the said railway company, since the passage of the aforesaid act of Congress, has constructed its railroad and telegraph in pur-
6 suance thereof, from the State line, near the mouth of the Kansas river, on the south side thereof, and from Wyandotte by the way of the Kansas river west, one hundred and fifty-five miles and upwards; and said company has also constructed its line from Leavenworth to its junction, at or near Lawrence, with the line extending up the Kansas river, distant thirty miles from Leavenworth; all of which said road and telegraph is now, and for a long time and ever since its completion has been, in the use and service of the government of the United States, as required and contemplated by said acts of Congress.

That as portions of said road have been, from time to time, com-

pleted and ready for use, as required by said acts, the same has been inspected by the proper commissioners, specified in said acts of Congress, upon whose reports the same have been accepted by the President of the United States, and the bonds of the United States have been issued to said company, at the rate of sixteen thousand dollars per mile, for one hundred and fifty-five miles of said rail-
7 road, for the repayment of which, principal and interest, the United States have a mortgage upon said railroad, and also its franchises and property, which franchises and property will be forfeited to the United States if default shall be made in the performance of all the stipulations and conditions contained in said acts of Congress to be performed by said company; that the said railway company, in due form, accepted said acts, and are bound thereby.

That the said company, by virtue of the power and authority contained in its said charter and the said acts of Congress, has obtained the title to various tracts, lots, and parcels of land, along and contiguous to its line of road, for the erection of shops, offices, and other appurtenances and maintaining the same, necessary to the successful operation of said railroad and telegraph, all of which is covered by the government mortgage to secure the repayment of the bonds issued as aforesaid. That by said acts of Congress the company, upon pain of forfeiture, is bound to proceed in the construction of the road and telegraph at the rate of one hundred miles per annum, to give
8 the government preference in all its business, to apply one-half of the compensation to be received for such service to the payment of the mortgage debts of the government, for said advance in bonds; to keep said railroad and telegraph at all times in repair and fit for use, as a first class railroad; to submit to such farther legislation as it may please Congress to make respecting the same, and finally, when the road is completed, to set apart and apply five per cent. of the net earnings of said road and telegraph to the payment of said indebtedness to the United States. That the railway company cannot comply with these and other conditions if the laws of the State of Kansas are construed and attempted to be enforced by the local and municipal authorities in said State against said company, be maintained. That the authorities of the county of Wyandotte, in said State, have assessed the railroad and telegraph property of said company, in said county, covered by said mortgage of the United States, by virtue of said acts of Congress and have levied a tax thereon, amounting to the sum of three thousand eight hund-
9 red and thirty-seven dollars and forty cents, and have placed the tax-roll for the collection of said tax in the hands of said defendant, James M. Funk, the treasurer of said county, to be collected, who demands payment of said company of said sum of money as a tax upon said railroad and telegraph property, for State, county, township, and city purposes, and threaten to collect said taxes by force of the laws of the State for the collection of taxes, unless the said taxes are voluntarily paid by said company. That the authorities of the county of Douglass have assessed the railroad and telegraph property of the said railway company in said county covered

by said mortgage of the United States, and have levied a tax thereon for State, county, township, and other municipal purposes of three thousand two hundred and twenty-eight 40-100 dollars, and have placed the tax roll for the collection of said taxes in the hands of said defendant, James Blood, treasurer of said county of Douglass, for collection, and he demands payment of said company of said taxes, and is about to proceed to enforce the payment of the same under the laws of the State unless said taxes are voluntarily paid by said company. That the authorities of the county of Jefferson, in said State, have assessed the railroad and telegraph propertyof the said company covered by said mortgage of the United States, and have levied a tax thereon in the sum of one thousand fifty-nine 83-100 dollars for State, county, school, and township purposes, and have placed the tax roll for the collection of the same in the hands of the defendant William A. Coy, treasurer of said county, who demands payment of the said taxes from the company, and threatens to proceed under and according to the laws of the State of Kansas, to enforce the payment thereof.

That the county authorities of the county of Shawnee, in said State, assessed said railroad and telegraph property in that county, and levied a like tax of more than two thousand dollars, which the company has, as your orators allege, improperly paid, and may proceed to pay the aforesaid taxes levied by the counties of Wyandotte, Douglass, and Jefferson if not restrained and enjoined by the order of this honorable court. Complainants allege that the said taxes levied by the said counties of Wyandotte, Douglas, and Jefferson have been illegally assesed and laid, and are wholly without warrant or authorityof law. That said railroad and telegraph property, being in part the property of the United States, is not subject to taxation by State authority. That the State of Kansas cannot by any law hinder, impede, or in any manner embarrass the operations of said railway company in the discharge of its duties and obligations to the United States, specified in said acts of Congress, and that those duties and obligations cannot, as your complainants have reasons to believe, be performed by the company and at the same time comply with the laws of the State, unless said laws shall be materially modified and changed. That the taxes now levied are upon but a limited portion of the said railroad and telegraph property, but the rates of taxation imposed demonstrate clearly that the earnings of the road will be inadequate to the payment and the performance of the obligations of the company to the government, if corresponding taxes are levied upon the whole line, the rate per mile being, in Douglass county, about four hundred dollars. Foreseeing the embarassment of the company and injury to the government likely to result from the levy of taxes upon this railroad and telegraph property under State authority, the subject was brought to the attention of the legislature of the State at its recent session, but no favorable action was obtained from that body, on the contrary the action of the legislature indicated an indisposition to relieve the company of any of the burden of taxes of which it complained, though their imposition

might impair the securities of the United States, hinder and delay and probably prevent their payment and frustrate and wholly prevent the accomplishments of the wise object and purpose of Congress as declared in said acts, all of which evil consequences your orators charge will be likely to result if the said railroad and telegraph property shall be made subject to the laws of the State. That in order to provide means necessary for the payment of taxes, the rates of the company will have to be largely increased, thereby imposing additional and onerous burdens upon the government
13 not contemplated by Congress. That in case of default by the company in the performance of its duties and obligations to the government, all of said railroad and telegraph property with the franchise of the company, will, by the terms of said acts of Congress, be forfeited to the United States, and the capital stock of said company held by your complainants will be rendured valueless, to their great and manifest injury, and the levying of said taxes is otherwise injurious to the complainants in depriving them of their just and proper dividends to be made to them as stockholders of said company.

For the reason stated in this bill, the complainants pray that the def'ts, The Union Pacific Railway Company, E. D., be enjoined from paying said taxes, and that the said defendants, Funk, Blood, and Coy, each and every of them, be enjoined from collecting said taxes, or any of the same, by them, to be collected upon the said tax rolls by them respectively held or otherwise, and that a temporary injunction issue, restraining and enjoining the
14 said defendants as above prayed, and that upon the first hearing hereof the said injunction may be made perpetual by the order and decree of this court, and that such other order and decree may be entered, and such other relief granted the complainants, as the nature of their case may require, according to the principles of equity and justice. To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, the said company answering as required by the rules and practice of this court, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to each of the several interrogatories hereinafter set forth, as they are respectively required to answer; that is to say:

1st. The defendant, The Union Pacific Railway Company, eastern division, will answer whether the complainants are stockholders in said company, as hereinafter alledged and set forth.

15 2d. Whether the said county authorities of Wyandotte, Douglas, and Jefferson have assessed the property of said company covered and embraced in the mortgage of the United States, and whether the defendants, Funk, Blood, and Coy, are demanding payment of the same of the company, and whether said company has paid any taxes levied upon said railroad and telegraph property

covered by the mortgage of the United States refered to in the foregoing bill.

3d. That the said defendants, Funk, Blood, and Coy, do each severally answer, and each for himself state and declare, whether any tax roll has been placed in the hands of each or either of them, and now held by them or either of them, requiring them to collect any sum or sums of money by way of taxes from the Union Pacific Railway Company, eastern division, on account of any assessment made on the property of said company; if so, that they do, each for himself, state what steps they, or either of them, have taken for the collection of said taxes, the amount of taxes each are re-
16 quired to collect, and upon what property and on what amount said taxes are levied, who levied the same, by what authority and for what specific purpose; appending to the respective answers of said defendants a complete copy of the tax roll in the hands of each, so far as the same in any manner concerns the collection of any tax of the said railway company, and state particularly whether they, or either of them, design to proceed to the collection of the taxes charged upon the tax rolls, in his hands for collection, from the Union Pacific Railway Company, eastern division.

The complainants ask that the process of this court in its usual form may issue on this suit against the defendants herein, The Union Pacific Railway Company, eastern division, John M. Funk, James Blood, and William A. Coy, commanding them, and each of them, by a certain day and under a certain penalty, to be and appear in this court and abide by and perform the orders and decrees of the same.

J. P. USHER, *Sol. for Comps.*

J. P. USHER, *Of Counsel.*

17 Which said bill is endorsed in words and figures as follows, to wit;

Endorsed: No. 108. John Edgar Thompson et al., plaintiffs, vs. The Union Pacific Railway Company, eastern division, John M. Funk, James Blood, William A. Coy, defendants. Bill. Filed March 26, 1867. A. S. Thomas, clerk. J. P. Usher.

And on the said 26th day of March, 1867, the complainants herein further filed in the said clerk's office a stipulation for costs herein, which is in words and figures as follows, to wit:

In the circuit court of the United States for the district of Kansas.

Stipulation.

JOHN EDGAR THOMSON *et al.*
vs.
THE UNION PACIFIC RAILWAY COMPANY, eastern division, *et al.*

I enter myself security for costs in said case, and promise to pay all costs which may accrue to the opposite party in this action or to

any officers of this court. And in default of payment by the plaintiff of any costs ordered or adjudged to be paid by them, I hereby agree and stipulate that execution may issue against my property for any costs taxed against them.

18 Dated this 26th day of March, A. D. 1867.

JNO. P. DEVEREAUX,

Which stipulation is endorsed in words and figures as follows:

No. 108. John Edgar Thomson et al. vs. The Union Pacific Railway Company, eastern division, et al. Stipulation for costs. Filed March 26th, 1867. A. S. Thomas, clerk. J. P. Usher.

Whereupon a writ of subpœna issued from the office of the clerk of said court in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *District of Kansas, ss:*

The United States of America to the Union Pacific Railway Company, eastern division, John M. Funk, James Blood, and William A. Coy, greeting:

We command you, and every of you, that you appear before our judge of our district court of the United States of America for the district of Kansas, at the city of Topeka, in said district, on the first Monday in the month of May next, to answer the bill of complaint of John Edgar Thomson, John McManus, Mathew Baird, Ed-

19 ward Miller, William Dennison, Thomas L. Jewett, George W. McCook, William H. Clement, George H. Pendleton, Alfred Gaither, Carlos S. Greeley, Giles F. Tilley, James Archer, Samuel T. Glover, James Shepley, Samuel M. Edgell, Oliver D. Tilley, and John P. Usher, this day filed in the clerk's office of said court, in said city of Topeka, then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Kansas to execute.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Topeka aforesaid, this 26th day of March, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the 91st.

A. S. THOMAS, *Clerk.*

Memorandum: The above-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at the city of Topeka aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against them as

20 confessed, and a decree entered accordingly.

A. S. THOMAS, *Clerk.*

Said writ being endorsed as follows:

Endorsed: No. 108. District court, United States district of Kansas. John Edgar Thomson et al. vs. The Union Pacific Railway

Company, eastern division, et al. Chancery subpœna. Returnable to rule day, first Monday in May, A. D. 1867. A. S. Thomas, clerk. Filed April 1st, A. D. 1867. A. S. Thomas, clerk. J. P. Usher, compl's sol.

Mar. return.

Received this writ this 26th day of March, 1867. Served this writ, this 27th day of March, A. D. 1867, on the within-named William A. Coy, by delivering to him a certified copy of this writ, with the endorsements. Served this writ, March 28th, A. D. 1867, on the within-named John M. Funk, by delivering to him a certified copy of this writ, with the endorsements thereon. Served this writ, March 29th, A. D., 1867, on the within-named James Blood, by delivering to him a certified copy of this writ, with the endorsements thereon. Served this writ, March 26th, A. D. 1867, on the 21 within-named Union Pacific Railway Company, by John P. Devereau acknowledgeing service for said company.

THOMAS A. OSBORNE.
U. S. Marshal.
By JEWELL, *Deputy.*

Fees:

Service on four	$2 00
150 miles travel to serve	15 00
3 copies	1 50
	18 00

I acknowledge service of the within summons this 26th March, 1867.

JNO. P. DEVEREAUX,
Att'y for Union Pacific R'way, E. D.

And on the first day of April, A. D. 1867, the complainants herein filed their affidavit in words and figures as follows, to wit:

In the circuit court of the United States for the district of Kansas.

Affidavit.

JOHN EDGAR THOMSON *et al.*
vs.
THE UNION PACIFIC RAILWAY COMPANY, E. D.—James Blood *et al.*

DISTRICT OF KANSAS, *ss:*

John P. Usher, one of the above-named complainants, being duly sworn, doth depose and say that the bill of complaint filed in this cause is true in substance and matter of fact, as this deponent verily believes; and further saith not.

J. P. USHER.

22 Subscribed and sworn to before me this, the 1st day of April, 1867.

MARK W. DELAHAY, *Judge.*

Which affidavit is endorsed in words and figures as follows, to wit: No. 108. John Edgar Thomson vs. Union Pacific R'way and others. Filed April 1st, 1867. A. S. Thomas, clerk.

And afterwards, to wit, on the 1st day of April, 1867, the following notice was filed in words and figures as follows, to wit:

In the circuit court of the United States for the district of Kansas.

Notice.—Bill to enjoin collection of taxes.

JOHN EDGAR THOMSON and OTHERS
vs.
THE UNION PACIFIC RAILWAY COMPANY, Eastern Division—John M. Funk, James Blood, and Wm. A. Coy. } In chancery.

The defendants will take notice that a motion will be made before the Hon. Mark W. Delahay, judge of the district court of the United States for the district of Kansas, at the Eldridge House, in Lawrence, Kansas, on the first day of April next, at one o'clock p. m. of said day, for an order of injunction in the above-entitled cause,
23 to be issued according to the course and practice of the court.

S. P. USHER,
Solicitor for Complainants.

I acknowledge service of the foregoing notice.
March 26th, 1867.

JNO. P. DEVEREAUX,
Att'y for Union Pacific Railway Co., E. D.

Which said notice is endorsed in words and figures, as follows, to wit: No. 108. Jno. Edgar Thomson and others vs. The Union Pacific Railway Co., E. D., and others. Notice. (Original.) Filed April 1, 1867. A. S. Thomas, clerk.

Mar. return.

Executed this writ March 27th, A. D. 1867, by delivering a copy of this writ to the within-named William A. Coy; also, March 28th, 1867, delivered a copy of this writ to the within-named John M. Funk; and on the 29th day of March, A. D. 1867, delivered a copy of this writ to the within-named James Blood.

THOMHS A. OSBORNE,
U. S. Marshal,
By BYRON JEWELL, *Deputy.*

Fees:

Service on three	$1 50
Mileage to serve	15 00
Three copies	1 50
	$18 00

24 And afterwards, to wit, on the 1st day of April, A. D. 1867, the following appearance to the motion was filed, in words and figures as follows, to wit:

United States district court, district of Kansas.

Motion for appearance.

JOHN EDGAR THOMSON *et al.*
vs.
THE UNION PACIFIC RAILWAY, EASTERN DIVISION, *et al.*

Now the said defendants, James Blood and John M. Funk, makes appearance for the purposes of this motion only, and objects to the proceedings and to the granting of the injunction prayed for, and moves that the proceeding be dismissed, on the ground that the honorable judge has not jurisdiction to grant the order.

JAMES BLOOD,
By THATCHER & BANKS,
His Att'y.

Which said motion is endorsed in words and figures as follows, to wit: 108. Dist. c't U. S., dist. Kans. John Edgar Thomson et al. vs. The U. P. Railway Co., E. D., et al. Motion. Thatcher & Banks, att's for Jas. Blood. Filed Ap'l 1st, 1867. A. S. Thomas, clerk.

25 And afterwards, to wit, on the 1st day of April, A. D. 1867, an injunction was awarded herein, and an order filed and entered therein, which said order is in words and figures as follows, to wit:

Injunction.

JOHN EDGAR THOMSON *et al.*
vs.
THE UNION PACIFIC RAILWAY COMPANY, E. D., *et al.* } 108.

MONDAY, *April* 1*st*, 1867.

Forasmuch as this court was this present day informed by Mr. Usher, being of the plaintiffs' counsel, that the defendants being served with process and notice of motion for injunction, and the defendants Funk and Blood appearing by Mr. Banks, their attorney, and the other defendant not appearing, though duly served with

notice of motion, and the matters having been heard, it is therefore ordered that an injunction be awarded for stay of the said defendants' proceedings in the payment of the taxes, in the bill mentioned, by the said railway company, and the collection of the same by the other defendants, until it shall be ordered to the contrary.

26 And it is further ordered, before the writ of injunction issue, the complainants shall file a bond of indemnity against costs and damages in the penalty of two thousand dollars, with John P. Devereux as security.

April 1st, A. D. 1867.

MARK W. DELAHAY, *Judge.*

And afterwards, to wit, on the 11th day of April, 1867, a bond for costs was filed, which said bond appears in words and figures as follows, to wit:

Bond for costs.

Know all men by these presents, that I, Jno. P. Devereaux, are held and firmly bound unto the Union Pacific Railway Company, eastern division, John M. Funk, William A. Coy, and James Blood, in the sum of two thousand dollars, for the payment of which, well and truly to be made, I bind myself, my heirs, and legal representatives firmly by these presents.

In testimony whereof, I have hereunto set my hand and seal at the city of Topeka, this 11th day of April, A. D. 1867.

The condition of the above obligation is such that, whereas,

27 an action has been commenced in the circuit court of the United States for the district of Kansas, wherein John Edgar Thomson et al. are complainants and the said Union Pacific Railway Company, eastern division, John M. Funk, William A. Coy, and James Blood, are defendants; and whereas, a writ of injunction has been awarded for stay of proceedings in the payment of the taxes in the bill mentioned, filed in the said action by the said railway company, and the collection of the same by the other defendants until it shall be ordered to the contrary. Now, therefore, if the said John Edgar Thomson, and the other complainants mentioned in the said bill, or either of them, shall pay all costs and damages which shall be adjudged against them in the said action, then this obligation shall be null and void, otherwise in full force and effect.

[SEAL.] JNO. P. DEVEREAUX.

Which bond is endorsed in words and figures as follows, to wit:

Endorsed: No. 108. John Edgar Thomson et al. vs. Union

28 Pacific Railway Company, eastern division, John M. Funk, William A. Coy, James Blood, J. P. Devereaux. Bond for costs. Filed April 11, 1867. A. S. Thomas, clerk.

And afterwards, to wit, on the 12th day of April, 1867, an injunction was issued herein, which said injunction is in words and figures as follows, to wit:

Injunction.

UNITED STATES OF AMERICA, *District of Kansas, ss:*

The United States of America to the Union Pacific Railway Company, eastern division, John M. Funk, James Blood and William A. Coy, and to their counsellors, attorneys, solicitors, and agents, and each of them, greeting:

Whereas it hath been represented to the judge of our district court, in and for the district of Kansas, in our court of chancery, on the part of John Edgar Thomson, John McManus, Matthew Baird, Edward Miller, William Dennison, Thomas L. Jewett, George W. McCook, William H. Clement, George H. Pendleton, Alfred
29 Gaither, Carlos S. Greeley, Giles F. Filley, James Archer, Samuel T. Glover, James Shepley, Samuel M. Edgell, Oliver D. Filley, and John P. Usher, complainants, that they have lately exhibited their bill of complaint in our said court of chancery, against you, the said Union Pacific Railway Company, eastern division, John M. Funk, James Blood, and William A. Coy, defendants, to be relieved touching the matters therein complained of.

In which said bill, it is amongst other matters set forth, that you, the said defendants, John M. Funk, as treasurer of Wyandotte county, and collector of taxes in and for said county, are about to levy and collect a large sum of money from said railway company, as and for taxes due and to be paid said county of Wyandotte, for State, county, and other purposes, upon tbe tax roll in your hands; and that you, the said James Blood, as the treasurer and collector of taxes of Douglass county, are about to levy and collect other a large sum of money from said railway company, as and
30 for taxes due and to be paid said county of Douglass for State, county, and other purposes upon the tax roll in your hands, issued by the authority of the said county of Douglass; and that you, the said William A. Coy, as the treasurer and collector of the county of Jefferson, are about to levy and collect from the said railway company other a large sum of money, as and for taxes due and to be paid said county for State, county, and other purposes upon the tax roll in your hands, issued by the authorities of the said county of Jefferson; and that you, the said Union Pacific Railway Company, eastern division, may in pursuance of the demands of said Funk, Blood, and Coy, pay the same to the injury of said complainants, stockholders of said company, and that the actings and doings of you, the said defendants, touching the matters in said bill mentioned, are contrary to equity and good conscience.

We, therefore, in consideration of the premises and of the
31 particular matters in the said bill set forth, do strictly enjoin and command you, the said John M. Funk, James Blood, and William A. Coy, and the Union Pacific Railway Company, E. D., and all and every the persons before mentioned, and each and every one of you, under the penalty of ten thousand dollars, to be levied on your and every of your lands, goods, and chattles to our use, that you and every of you do absolutely desist and refrain from all further attempts to collect said taxes, and the said company from paying the

same, until the further order of our said court of chancery to the contrary, and this under the pain aforesaid.

To the marshal of the district of Kansas to execute.

Witness the Hon. S. P. Chase, Chief Justice of the Supreme Court of the United States, held at Topeka, this the 12th day of April, in the year of our Lord one thousand eight hundred and sixty-seven, and of our independence the 91st.

[SEAL.] A. S. THOMAS, *Clerk.*

32 Which writ of injunction is endorsed in words and figures as follows, to wit:

Endorsed: United States circuit court, district of Kansas, No. 108. John Edgar Thomson et al. vs. The U. P. R. W. Co., E. D., John M. Funk et al. Writ of injunction approved. Ap. Mark W. Delahay, Judge. Filed May 21st, 1867. A. S. Thomas, clerk. J. P. Usher, sol. for complt's.

Mar. return.

Rec'd this order this 24th day of April, 1867. Executed this order by delivering to the within-named John M. Funk a true copy of this order; also by leaving a certified copy at the office of Jame Blood, co. treasurer of Douglas county; also by leaving a true copy at the office of William A. Coy, county treasurer of Jefferson county.

CHARLES C. WHITING,
U. S. Marshal Dist. of Kansas.

Fees:

Service on three	$6 00
190 miles travel	19 00
	$25 00

33 And afterwards, to wit, on the 25th day of April, A. D. 1867, the said defendant, James Blood, by his attorneys, Thatcher & Banks, filed his appearance in this cause, which is in words and figures as follows, to wit:

In the circuit court of the United States of America for the district of Kansas.

App. Jas. Blood.

JOHN EDGAR THOMSON *et al.*, pl'ffs,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Eastern Division, JOHN M. FUNK, JAMES BLOOD, and WILLIAM A. COY, def'ts. } Appearance.

SIR: Please to enter our appearance for the defendant James Blood in the above cause.

Dated Lawrence, Douglas county, Kansas, April 25th, 1867.

THATCHER & BANKS,
Solicitors for Jas. Blood, Defendant.

TO A. S. THOMAS, Esq., *Clerk of said Court.*

Which said appearance is endorsed in words and figures as follows, to wit:

Endorsed: No. 108. John Edgar Thomson et al. vs. Union Pacific Railway Company, E. D. Filed Ap'l 25, 1867. App. of James Blood. A. S. Thomas, clerk.

34 And afterwards, to wit, on the 29th day of April, 1867, the defendant, Jno. M. Funk, by his attorneys, W. P. Gambell, W. C. McDowell, and Chas. S. Glick, filed their appearance in said cause, which is in words and figures as follows, to wit:

In the circuit court for the district of Kansas, in chancery sitting.

App. of J. M. Funk.

JOHN EDGAR THOMSON *et al.*, comp'ts,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Eastern Division, John M. Funk *et al.*, defendants.

UNITED STATES OF AMERICA, *sct:*

The clerk of the court aforesaid is hereby directed to enter our appearance as solicitors for the above-named defendant, John M. Funk. April 29, 1867.

W. P. GAMBELL.
W. C. McDOWELL.
CHAS. S. GLICK.

To A. S. THOMAS, Esq., *Clerk, &c.*

Which said appearance is endorsed in the words and figures as follows, to wit:

Endorsed: No. 108. In the United States circuit court for the district of Kansas, in chancery sitting. John Edgar Thomson et al. vs. The Union Pacific R. W. Co., E. D., et al. Appearance for def't, Jno. M. Funk. Filed April 29, 1867. A. S. Thomas, clerk.

35 And afterwards, to wit, on the 4th day of May, 1867, the said defendant, the Union Pacific Railway Company, E. D., et al., by their attorney, J. P. Devereaux, filed their appearance in said cause in words and figures as follows, to wit:

In the circuit court of the United States for the district of Kansas, in chancery sitting.

App. Railway Co.

JOHN EDGAR THOMSON *et al.*, compl'ts,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Eastern Division, d'f't.

The clerk of the court aforesaid is hereby directed to enter my appearance as solicitor for the Union Pacific Railway Company, eastern division.

May 4, 1867.

JNO P. DEVEREAUX,
Att'y for U. P. R. Way Co., E. D.

To A. S. THOMAS, *Clerk.*

Which said appearance is endorsed in words and figures as follows, to wit:

Endorsed: No. 108. John Edgar Thomson et al. vs. Union Pacific Company, E. D., et al. App. for def't, Railway Company. Filed May 4, 1867. J. P. Devereaux, sol. A. S. Thomas, clerk.

36 And afterwards, to wit, on the 4th day of May, 1867, the said defendant William A. Coy, by his attorney Henry Keeler, filed his appearance in said cause, which is in words and figures as follows, to wit:

In the circuit court of the United States of America for the district of Kansas.

App. W. A. Coy.

JOHN EDGAR THOMSON *et al.*, plaintiffs,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Eastern Division, John M. Funk, James Blood, and William A. Coy, defendants. } Appearance.

SIR: Please enter my appearance for the defendant William A. Coy, in above cause.

Dated Oskaloosa, Jefferson county, Kansas, May 2d, A. D. 1867.

HENRY KEELER,
Solicitor for William A. Coy, Defendant.

To A. S. THOMAS, *Clerk of said Court.*

Which said appearance is endorsed in words and figures as follows, to wit:

Endorsed: No. 108. John Edgar Thomson et al. vs. The Union Pacific Railway Company, E. D., et al. App. of Wm. A. Coy. Filed May 4th, 1867. A. S. Thomas, clerk.

37 And afterwards, to wit, on the 24th day of May, 1867, one of the said defendants, John M. Funk, filed in the office of the clerk of the circuit court of the United States aforesaid his answer in words and figures as follows, to wit:

In the circuit court of the United States for the district of Kansas, in chancery sitting.

Answer J. M. Funk.

JOHN EDGAR THOMSON *et al.*, complainant,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Eastern Division, John M. Funk, James Blood and William A. Coy, defendants.

The several answers of John M. Funk, one of the defendants, to the bill of complaint of John Edgar Thomson et al., complainants: This defendant now, and at all times hereafter, saving and reserving to himself all manner of advantage and exception to the many

errors and insufficiences in the said complainants' bill of complaint contained, for answer thereunto, or to so much and such parts
38 thereof as this defendant is advised is material for him to make answer unto, answers and for himself says the taxes were levied as in said complainants' bill of complaint set forth; and that this defendant was, at the date of the filing of said bill, as treasurer of said county of Wyandotte, proceeding, as in said bill stated, to collect said taxes, but that he had not levied upon or seized any of the personal effects of said railway company or of any stockholder therein, nor had he advertised for sale any of the real property of said railway company or that of any stockholder therein for said taxes.

And this defendant, further answering, says that he is a stranger to all and singular the proceedings of the said counties of Douglas, Jefferson, and Shawnee, and disclaims any interest therein. And this defendant, further answering, says that, as he is advised and verily believes, said taxes have been leg lly assessed and laid, and are authorized by the laws of the said State of Kansas. And this defendant, further answering, says that he denies that the
39 said railway and telegraph property in said bill described as in whole or in part the property of the United States, but alleges that the said Union Pacific Railway Company is, and at the date of the filing of said bill of complaint was, a corporation created and existing under and by virtue of the laws of the said State of Kansas. And this defendant, further answering, says that the stockholders in said corporation have invested their capital and money therein for the purpose of private gain and emolument, and not as government agents, or as sustaining any other relation to the said government of the United States than as private citizens. And this defendant, further answering, denies that the said State of Kansas has attempted to, or is about to, impede or embarass the carrying out of [of] the great public enterprise in said bill described; but that as to what efforts were made by the said company, at the recent session of the legislature of the said State of Kansas, in the way of securing advantages to said corporation, this defendant has no knowledge,
40 information, remembrance, or belief.

And this defendant, further answering, denies that, under and by virtue of the laws of the said State of Kansas, the franchises or privileges of said railway company have been or are about to be interfered with in any manner whatever; but, on the contrary, this defendant alleges that only the property of said corporation liable to taxation has been taxed in the same manner and according to the same rates as that of other railroad corporations in said State.

And this defendant, further answering, says that he denies that, in order to provide means necessary for the payment of taxes, the rates of the company will have to be largely increased, and denies that thereby additional and onerous burthens will be imposed upon the government of the United States not contemplated by Congress. And this defendant, further answering, says that he has been and is in no way a party to any attempt upon the part of said com-
41 pany to disregard the duties imposed upon it by the act of

Congress in said bill referred to. And this defendant, further answering, says that he is not concerned with the dividends that may be made to the stockholders in said company, but submits to the court that all property within said State should equally contribute to the burthens of taxation.

And this defendant, further answering, alleges that he is ignorant as to whether the said complainants, or either of them, are owners of stock in said railway company, or the amount thereof, or whether they, or either of them, are citizen, as alleged in said bill, or the value of the stock so alleged to be owned by them, respectfully.

This defendant, further answering, admits that said railroad has been constructed as in said bill alleged; but this defendant denies that said road, as alleged in said bill, has been or is in the use or service of the said United States; but, on the contrary, this defendant allges that the said railroad has been, since the construction thereof, operated mainly for the benefit and advantage of the stockholders therein, and that the government of the United States does

42 not operate, nor in any way control the operation of the same.

And this defendant, further answering, avers that the receipts of said railroad for freights, passengers, and so forth, for the month ending the first day of April, 1867, was over the sum of ninety-three thousand dollars, and that the business thereof has since then been continually increasing.

And this defendant, further answering, says, that the said company, at the time of the levying said taxes, and at the time of filing said bill, had ample means and money wherewith to pay said taxes; and that the payment thereof would not have interfered with any obligations which said railway company was or is under to said United States; but, on the contrary, said railway company owns and possesses, in said State and along the line of said road, over three hundred thousand acres of land, of great value, and, this defendant believes, of the average value, at least, of five dollars per acre.

And this defendant, further answering, says, that he does

43 not know whether said road has been built, inspected, or whether bonds have been issued, as in said bill set forth, but believes the allegations contained in the said bill in that regard to be true.

And this defendant, further answering, says, that the said railway company can comply with the conditions in said bill mentioned, even though the laws of said State of Kansas, as attempted to be enforced by the local and municipal authorities of said State against said company, should be maintained.

And this defendant, further answering, alleges, that the capital stock paid up of said railway company amounts to, as this defendant is informed and verily believes, to the sum of ten millions of dollars, and that no demand has ever been made upon said railway company by the said complainant, or any stockholder in said company, to institute proceedings to prevent the collection of said taxes.

And this defendant, further answering, says, that the property of

said railway company only bears its due proportion of the
44 taxes levied upon all the property in said State, and that no discrimination has been or is made against said railway company in the matter of taxation.

And this defendant, further answering, says, that the county of Leavenworth, in said State of Kansas, is, and was at the date of the filing of this bill, the owners of, and by and through its proper officers, in the possession of fully paid up stock in railway company, to the amount of two hundred and fifty thousand dollars.

And defendant, further answering, avers, that as he is informed and verily believes, when the bill of complaints was filed in this court, the defendant, the railway, through its legally constituted and appointed agents and directors of it, was legally bound to do way, without objection or complaint, paying and proceeding to pay the taxes in said bill complained of.

And this defendant, further answering, says, that as he is informed and verily believes, that the value in money of track, road-bed,
45 and rolling stock of said railway company, per mile, is greater than the lien of the government of the United States thereon; that the same is constantly increasing in value, and that with its curent receipts, franchises, lands, and assets, said railway company is in condition to discharge all its obligations, of every sort, including the taxes levied by the State of Kansas, and that in the said county of Wyandotte said railway company, apart from the road-bed and right of way, own a large quantity of land, to wit, about five thousand acres.

And defendant, further answering, says, that he hereto attaches a copy of the tax roll of said county of Wyandotte, so far as it affects said railway company; which said copy is marked Exhibit (A); which defendant prays may be considered as part of his answer; and that the taxes therein specified and stated, were levied upon the railway company property, therein mentioned by the authorities of the county of Wyandotte, under and by virtue of the laws of the State of Kansas. All which matters and things this defendant is ready to aver,
maintain, and prove, as this honorable court shall direct; and
46 hum bly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

J. M. FUNK.

CHARLES S. GLICK,
Solicitor for Defendant.
W. B. GAMBELL, and
W. C. MCDOWELL,
Of Counsel.

THE STATE OF KANSAS, *Leavenworth County, ss:*

John M. Funk makes oath and says, that he is the defendant herein answering; that he has read the foregoing answer subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated to

be on information and belief of the defendant, and that as to those matters he believes it to be true.

J. M. FUNK.

Sworn to by J. M. Funk before me, and subscribed by him in my presence, this 23d day of May, A. D. 1867.

In testimony whereof I hereto set my hand and affix the seal of the district court of the State of Kansas, in and for Leavenworth county, the day aforesaid.

[SEAL.] DAVID J. BREWER,
Judge District Court.

47

County contingent.	Bridge int. fund.	Bridge sinking fund.	Township.	District School Tax.			Total.	Penalty.	Aggregate.
				Buildings.	Teachers' wages.	School supplies.			
$28 08	$168 48	168 48	28 08	140 40	.....	.....	933 66	93 36.6	1,027 02.6
22 20	133 20	133 20	22 20	55 50	55 50	.....	738 15	73 81.5	811 96.5
38 78	232 68	232 68	38 78	77 56	193 90	96 95	1,463 94.5	146 39.4	1,610 33.9
58	3 48	3 48	58	.....	.....	.....	16 38.5	1 63.8	18 02.3
40	2 40	2 40	40	.....	.....	.....	11 30	.....	11 30
2 50	15 00	15 00	2 50	12 50	.....	.....	83 12.5	8 31.2	91 43.7
92 54	555 24	555 24	92 54	285 96	249 40	96 95	3,246 56.5	322 52.5	3,570 09.0

49

County contingent.	Bridge int. fund.	Bridge sinking fund.	Township.	Wyandotte city taxes.		Total.	Penalty.	Aggregate.
				City general.	Bridge sinking and interest fund.			
$2 52.5	$15 15	$15 15	$2 52.5	$12 62.5	$50 50	$134 45.6	$13 44.5	$147 90.1
8 34.5	50 07	50 07	8 34.5	41 72.5	166 90	444 37.1	44 43.7	488 80.8
20	1 20	1 20	20	1 00	4 00	10 65	1 06.5	11 71.5
20	1 20	1 20	20	1 00	4 00	10 65	1 06.5	11 71.5
20	1 20	1 20	20	1 00	4 00	10 65	1 06.5	11 71.5
20	1 20	1 20	20	1 00	4 00	10 65	1 06.5	11 71.5
20	1 20	1 20	20	1 00	4 00	10 65	1 06.5	11 71.5
20	1 20	1 20	20	1 00	4 00	10 65	1 06.5	11 71.5
25	1 50	1 50	25	1 25	5 00	13 31.3	1 33.1	14 64.4
25	1 50	1 50	25	1 25	5 00	13 31.3	1 33.1	14 64.4
25	1 50	1 50	25	1 25	5 00	13 31.3	1 33.1	14 64.4
25	1 50	1 50	25	1 25	5 00	13 31.3	1 33.1	14 64.4
25	1 50	1 50	25	1 25	5 00	13 31.3	1 33.1	14 64.4
30	1 80	1 80	30	1 50	6 00	15 97.5	1 59.7	17 57.2
1 25	7 50	7 50	1 25	6 25	25 00	66 56.2½	6 65.6	73 18.1
14 87	89 22	89 22	14 87	74 35	297 40	791 82.9½	79 18	870 97.1

50

Name of owner.	Description.	Lot.	Block.	Valuation.		State, general.	State, school.	County, gen'l.
Union Pacific Railway Company, E. D.	Commencing at the quarter section corner, on the line dividing section 2 and section 3, t'p 11, R. 25; thence east 5.19-100 chains, to a stake on the right bank of the Mo. river; thence up said river N. 10° 12′ E., 15.31-100 chains to a stake on the right bank of said river; thence W. 15 ch. and 41 links to a stake; thence S. 19.32-100 chs.; thence E. 5.72-100 chains to beginning, containing 25.25-100 a.	.....	.....	.....	$25 25	8 58.5	$2 14.6	$25 25
Union Pacific Railway, eastern division.	Road-bed and superstructure within the corporate limits of Wyandotte city.	.....	.....	62 15				
	Water and wood stations, and other structures, Wy. city.	.....	.....	4 50				
	Apportionment of rolling-stock, do	.....	.....	12 00				
	Apportionment of personal property	.....	.....	4 80				
					83 45	28 37.3	70 93.1	83 45
		1	4		200 00	68	17	2 00
		2	4		200 00	68	17	2 00
		3	4		200 00	68	17	2 00
		4	4		200 00	68	17	2 00
		5	4		200 00	68	17	2 00
		6	4		200 00	68	17	2 00
		1	5		250 00	85	21.3	2 50
		2	5		250 00	85	21.3	2 50
		3	5		250 00	85	21.3	2 50
		4	5		250 00	85	21.3	2 50
		5	5		250 00	85	21.3	2 50
		6	5		300 00	1 02	25.5	3 00
		S. ½ 5	16		1,250 00	4 25	1 06.2½	12 50
					14,870 00	50 55	12 64.1½	148 70

Name of Owner.	Description.	Valuation.		State general.	State school.	County general.
Union Pacific Railway, eastern division.	Road-bed and superstructure contained in the limits of school district No. 9	$21,990				
	Proportion of rolling stock of said road belonging to said school district No. 9	4,350				
	Proportion of personal property belonging to said road in said school district No. 9	1,740				
			28,080	$95 47.2	$23 86.8	$280 80
Union Pacific Railway, eastern division.	Road-bed and superstructure contained in the limits of school district No. 2	17,370				
	Proportion of rolling stock of said road belonging to said school district No. 2	3,450				
	Proportion of personal property of said road belonging in school dist. No. 2	1,380				
			22,200	75 48	18 87	222 00
Union Pacific Railway, eastern division.	Road-bed and superstructure contained in the limits of school district No. 5	30,380				
	Proportion of rolling stock of said road belonging to said school district No. 5	6,000				
	Proportion of personal property of said road belonging to said school district No. 5	2,400				
			38,780	131 85.2	32 96.3	387 80
Union Pacific Railway, eastern division.	Two tracks, each 125 ft. wide by 1,018 ft. long, 1 on each side of U. P. railw'y line east of Kansas river to eastern terminus, 5 80-100 acres		580	1 97.2	49.3	5 80
U. P. Railway, east. div.	Personal property (Wyandotte township at large)		400	1 36	34	4 00
Union Pacific Railway, eastern division.	Commencing at the centre of sec. 15, t'p 11, R. 25; thence E. 8 p's. S. 362½ ft.; thence southwesterly along the S. line of the Union Pacific railway, E. D., 1,227 4-10 feet; thence N. 948 ft.; thence east 57 poles to the beginning, containing 14 29-1000 acres		2,500	8 50	2 12.5	25 00
			2,540	314 63.6	78 64.9	925 40

54

55 *Recapitulation.*

Total valuation Wyandotte city		$14,870
Total valuation Wyandotte t'p		92,540
Total valuation		$107,410
State general		365 19.4
State school		100 30
County general		1,074 10
County contingent		107 41
Bridge interest fund		644 46
Bridge sinking fund		644 46
Township		107 41
School tax	Buildings	285 96
	Teachers' wages	249 40
	School supplies	96 95
Wyandotte city taxes.	General	74 35
	Bridge interest and sinking fund	297 40
Total		4,047 39.4
Penalty		402 70.5
Aggregate		4,450 09.9

Which said answer is endorsed in words and figures as follows, to wit:

108. John Edgar Thomson et al., compl'ts, vs. The Union Pacific Railway Company, eastern division, et al., def'ts. Answer of
56 J. M. Funk. Filed May 24, 1867. A. S. Thomas, clerk. C. S. Glick, sol.

57 And afterwards, to wit, on the 3rd day of June, A. D. 1867, one of the said defendants, James Blood, by his attorneys, Thatcher and Banks, filed in the clerk's office of the circuit court of the United States aforesaid, his answer in words and figures as follows, to wit:

In the circuit court of the United States for the district of Kansas.

Answer of James Blood.

JOHN EDGAR THOMSON *et al.*
vs.
JAMES BLOOD, WILLIAM A. COY, JOHN M. FUNK, and The Union Pacific Railway Company, eastern division.

The several answers of James Blood, one of the above-named defendants, to the bill of complaint herein filed against him by John Edgar Thomson et al., complainants.

This defendant reserving to himself all right of exception to the bill of complaint herein filed against him, for his several answers to so much thereof as he is advised and believes material and necessary for him to do, making answer, says that he is ignorant save as informed by the bill of complaint herein, and has no belief thereupon,
58 whether or not the complainants are citizens, as they have alleged in said bill of complaint; that he is ignorant of, save as informed by the bill of complaint herein, and has no belief thereupon, whether the complainanants are the owners, as in their bill of complaint alleged, of any shares of the capital stock of the Union Pacific Railway Company, eastern division, or of the number of shares of said stock as alleged in said bill of complaint.

The defendant, further answering, says, he admits and does aver that the said Union Pacific Railway Company, eastern division, is a citizen of the State of Kansas, and that it was incorporated by the governor and legislative assembly of the Territory of Kansas, and now exists under and by virtue of the constitution and laws of the State of Kansas; that it is building and operating the Union Pacific railway, eastern division, through said State of Kansas, under and by virtue of the laws of said State of Kansas; and that it claims the benefit of the act of Congress entitled "An act to aid in the construction of a railway and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use
59 of the same for postal, military, and other purposes," approved July 1st, 1862, and the several acts of Congress amendatory thereof.

The defendant, further answering, says, that he does not deny but what said railway company has constructed one hundred and fifty miles of its railroad and telegraph line up the Kansas river, commencing at the State line on the south side thereof, and also a branch from Leavenworth to the junction of said main line of railroad and said branch near Lawrence; but the defendant does deny that said railroad and telegraph line so constructed have since their completion, as in said bill of complaint alleged, been in the use and service of the government of the United States, except that said government has had the preference over other shippers of freight on said railroad in having its freight first transported, but that for such service the government has been charged by said railroad company the same as other persons using and employing said road.

And the defendant further says, that the building of said road and telegraph line from Leavenworth to said junction at or near
60 Lawrence, was in a large degree induced by the consideration that the county of Leavenworth should take and subscribe to the capital stock of the Union Pacific Railway Company the sum of, as the defendant is informed and verily believes, two hundred and fifty thousand dollars; and the defendant avers that he is informed and verily believes that the said county of Leavenworth, in said State of Kansas, is possessed of and owns the said sum of two hundred and fifty thousand dollars fully paid up capital stock of said company.

The defendant, further answering the said bill of complaint, says, he has no information touching the inspection of said road and telegraph line by commissioners, as is set forth in said complaint, nor of the acceptance of the same by the President of the United States, nor of the issuance to said company of the bonds of the United States, as is set forth in said complaint, but defendant supposes it to be true as alleged by the complainants, and the defendant admits that the issuance of said bonds, and the acceptance thereof by said company,

61 does thereby give to the government of the United States a mortgage upon said railroad and its franchises and property as is enacted in said act of Congress; but the defendant avers that he is informed and that he verily believes, that said railroad company has issued its first mortgage bonds on said railroad franchises and property thereof, as by the amendatory act of Congress, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes,' approved July 1st, 1862," approved July 2nd, 1864, said railroad company was entitled to do; and that the first lien of mortgage upon said railroad is held and owned by divers persons to this defendant unknown, holders of the bonds so issued as a first lien of mortgage on said road; and the defendant denies that failure to pay said bonds so issund by the United States, or interest thereof by said railroad company, works a forfeiture to the United States of railroad franchises and property;

62 and this defendant avers that failure to pay said bonds and interest only authorizes the Secretary of the Treasury to take possession of said road, together with its immunities, rights, functions, and appurtenances, and also all lands granted to said company by the United States, and still remaining in the ownership of said company; and that forfeiture of said road and franchises to the United States can only ensue by the failure to complete the roads mentioned in said act of Congress, so as to form a continuous line from the Missouri river to the navigable waters of the Sacramento river in California, by the first day of July, A. D. 1876. The defendant admits that, under said act of Congress and the amendatory acts thereof, the said company is bound to prosecute its work as alleged in said bill of complaint, to give the government of the United States preference as shippers over its road, and, generally, that said company are bound to comply with all the duties and obligations imposed by said acts of Congress.

63 The defendant denies that the enforcement of the laws of the State of Kansas with respect to the assessment and collection of taxes, will prevent or render unable said railroad company to meet its obligations to the United States; defendant avers that said railroad, fixtures, and other property of said Union Pacific Railway Company is asssessed and taxed in the same way and to the same extent as is all the other property of individuals and corporations in said State of Kansas; that it is right and just that said railroad, with its appurtenances, should be taxed and bear an equal bur-

den of taxation with the other property owned and held in the State; that it would be for a corporation owing its existence and life to the constitution and laws of the State, to evade bearing its due proportion of the public burden that are met by taxation; that the mortgage lien of the United States does not constitute the government of the United States part owner of said railroad and appurtenances.

The defendant admits that said railroad company may proceed to pay the taxes assessed on said road and appurtenances; and the defendant avers that said company was about to pay the taxes so assessed
64 in said county of Douglas, when it was enjoined by the complainants from so doing. This defendant avers that the said company was amply able, and still is, to pay said taxes at the time they were levied; that its receipts for freight and passengers are large—amounting, as this defendant is informed, for the month ending April 1st, 1867, to upwards of ninety thousand dollars; that it has large bodies of land in the State of Kansas of great value; that said lands are in the aggregate, as the defendant is informed and believes, worth the sum of three dollars per acre and are upwards of one million of acres.

The defendant admits that the State cannot interfere with the obligations due from the said company to the United States; and the defendant denies that the payment of taxes by said company does so interfere or impede said company in the performance of its duties. The defendant avers that the complainants have invested their means in the said railroad and appurtenances for their own benefit and profit, and that their claim, that payment of the taxes due the State from said company will diminish their dividends on their shares in
65 said company, really furnishes no excuse or reason why said company should be released from its share of the public burdens.

The defendant says that he is an entire stranger to all his co-dedefendants and has no interest in common with them.

The defendant, further answering, says, he has no knowledge of any application of said company to the legislature of the State of Kansas, as set forth in said bill of complaint, and that he cannot see how he is concerned therewith.

The defendant denies that said company have immunities from taxation by reason of said acts of Congress or in consequence thereof.

The defendant denies that any of the operations of said company, or any of its obligations to the United States, will be embarrassed by a due observance of the laws of the State to which it owns its existence and maintenance.

The defendant says that he is informed, and verily believes, that the value of said road and appurtenances is more than double
66 the lien upon it of the United States, and that the property so covered by mortgage to the United States is rapidly increasing in value.

The defendant denies that the payment of taxes by said compnay will compel it to largely increase its rates; but defendant alleges that

the rates of said company are largely in excess of any railroad in the west, and that the business of said road is already conducted, even in its present incohoate state, with large profits to its stockholders. The defendant denies that for any or all the reasons set forth in said bill of complaint, are the complainants entitled to the relief prayed for.

The defendant, as part of his answer, and which he asks may be so considered, attaches a copy, mark Exhibit A, of the tax roll of said Douglas county so far forth as it affects said railroad company, and the defendant states that the taxes therein specified were levied by the county commissioners of said county of Douglas under and by virtue of the laws of the State of Kansas, and he states that, as
67 treasurer of Douglas county, he was about to collect said tax at the time he was enjoined by complainants herein, but had not seized nor made any levy on property of said company.

All which matters and things this defendant is ready to prove and maintain as this honorable court shall direct, and he humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully expended.

JAMES BLOOD.

THE STATE OF KANSAS, *Douglas County:*

James Blood makes oath and says that he is defendant herein answering; that he has read the foregoing answer subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief of the defendant, and that as to those matters he believes it to be true

JAMES BLOOD.

68 Subscribed and sworn to before me, and in my presence this 1st day of June, A. D. 1867, by James Blood

In testimony whereof I have hereunto set my hand and affixed the seal of the district court of the State of Kansas sitting in and for Douglas county, the day and year aforesaid

[SEAL.] B. D. PALMER, *Clerk*,
By A. J. REID, *Deputy*.

Subscribed in my presence, and sworn to before me, James M. Hendry, probate judge in and for the county of Douglas, Stateof Kansas, by James Blood, this 14th day of June, A. D., 1867,

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court

[SEAL.] JAMES M. HENDRY,
Judge of the Probate Court of Douglas County, State of Kansas.

Names.	Block or street.	Lot.	Real estate valuation.	State tax.	State sinking fund tax.	County tax.	Corporation tax.	School tax.	Total.
Union Pacific Railway Co., eastern division..	N. E. ¼ block No. 2	2½ acres	$750	3 00	1 50	6 75	1 87	9 75	$22 87
Do	N. ½ do do 3	5...do	1,500	6 00	3 00	13 50	3 75	19 50	45 75
Do	N. ½ do do 4	5...do	2,600	10 40	5 20	23 40	6 50	33 80	79 30
Do	N. ½ do do 5	5...do	1,500	6 00	3 00	13 50	3 75	19 50	45 75
Do	Block 5	Lot 21	80	32	16	72	20	1 04	2 44
Do	do	22	80	32	16	72	20	1 04	2 44
Do	do	23	80	32	16	72	20	1 04	2 44
Do	do	24	80	32	16	72	20	1 04	2 44
Do	do	25	80	32	16	72	20	1 04	2 44
Do	do	26	70	28	14	63	17	91	2 13
Do	do	27	70	28	14	63	17	91	2 13
Do	do	28	70	28	14	63	17	91	2 13
Do	do	29	70	28	14	63	17	91	2 13
Do	do	30	70	28	14	63	17	91	2 13
Do	do	31	70	28	14	63	17	91	2 13
Do	do	32	70	28	14	63	17	91	2 13
Do	do	33	70	28	14	63	17	91	2 13
Do	do	34	70	28	14	63	17	91	2 13
Do	do	35	70	28	14	63	17	91	2 13
Do	do	36	70	28	14	63	17	91	2 13
Do	do	37	70	28	14	63	17	91	2 13
Do	do	38	70	28	14	63	17	91	2 13
Do	do	39	70	28	14	63	17	91	2 13
Do	do	40	70	28	14	63	17	91	2 13
Do	1¼ miles of roadway, including lands and all improvements.	.....	21,350 00	85 40	42 70	192 15	53 38	277 55	651 28
				$116 60	58 30	262 25	72 70	378 95	889 10

70

71 *Tax roll Wakarusa township.—Extract*

Name	Description	Valuation.	State tax.	State sinking fund.	County tax.	Town tax.	School tax.	Total
Union Pacific Railway, E. D	Improvements on 7 miles of roadway	$77,000	308	154	693	38 50	1,010 10	$2,203 60

Which said answer is endorsed in words and figures as follows, to wit:

Endorsed: No. 108. Circuit court U. S., district of Kansas. John Edgar Thomson et al vs. James Blood et al. Answer of defendant, James Blood. Thatcher & Banks, solicitors for def't. Thatcher & Banks, of counsel. Filed June 3, 1867. A. S. Thomas, Clerk.

72 At a term of the circuit court of the United States, in and for the district of Kansas, begun and held at the city of Topeka, is said district, on Monday, the twenty-seventh day of May, in the year of our Lord one thousand eight hundred and sixty-seven, proceedings were had in this cause, and appear of record in words and figures as follows, to wit:

JOHN EDGAR THOMPSON *et al.*
vs.
UNION PACIFIC RAILWAY COMPANY, E. D., *et al.* } 108.

TUESDAY, *May 28th*, 1867.

Ordered that this cause be continued to next term, and that the order of injunction heretofore granted be continued until the next term of this court and its further order

73 And afterwards, to wit, on the 3rd day of June, A. D. 1867, one of the said defendants in this cause, William A. Coy, filed his answer, by his attorneys, Thatcher and Banks, in the office of the clerk of the circuit court of the United States aforesaid, in words and figures as follows, to wit:

In the circuit court of the United States for the district of Kansas.

Answer W. A. Coy.

JOHN EDGAR THOMSON *et al.*
vs.
JAMES BLOOD, WILLIAM A. COY, JOHN M. FUNK, and the Union Pacific Railway Company, eastern division.

The several answers of William A. Coy, one of the above-named defendants, to the bill of complaint herein filed against him by John Edgar Thomson et al., complainants.

This defendant, reserving to himself all right of exception to the bill of complaint herein filed against him, for his several answers to so much thereof as he is advised and believes material and necessary for him to do, making answers, says, that he is ignorant, save as informed by the bill of complaint herein, and has no belief
74 thereupon whether or not the complainants are citizens as they have alleged in said bill of complaint; that he is ignorant of, save as informed by the bill of complaint herein, and has no belief thereupon, whether the complainants are the owners, as in their bill of complaint alleged, of any share of the capital stock of the Union Pacific Railway Company, eastern division, or of the number of shares of said stock as alleged in said bill of complaint.

The defendant, further answering, says he admits and does aver that the said Union Pacific Railway Company, eastern division, is a citizen of the State of Kansas, and that it was incorporated by the governor and legislative assembly of the Territory of Kansas, and now exists under and by virtue of the constitution and laws of the State of Kansas; that it is building and operating the Union Pacific Railway, eastern division, through said State of Kansas under and by virtue of the laws of said State of Kansas, and that it claims the benefit of the act of Congress entitled "An act to aid in the
75 construction of a railway and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July 1st, 1862, and the several acts of Congress amendatory thereof.

The defendant, further answering, that he does not deny but what said railway company has constructed one hundred and fifty miles of its railroad and telegraph line up the Kansas river, commencing at the State line on the south side thereof, and also a branch from Leavenworth to the junction of said main line of railroad and said branch, near Lawrence; but the defendant does deny that said railroad and telegraph line so constructed have since their completion, as in said bill of complaint alleged, been in the use and service of the government of the United States, except that said government has had the preference over other shippers of freight on said road in having its freight first transported, but that for such services
76 the government has been charged by said railroad company the same as other persons using and employing said road.

And the defendant further says that the building of said road and telegraph line from Leavenworth to said junction at or near Lawrence, was in a large degree induced by the consideration that the county of Leavenworth should take and subscribe to the capital stock of said Union Pacific Railway Company the sum of, as the defendant is informed and verily believes, two hundred and fifty thousand dollars, and the defendant avers that he is informed and verily believes that the said county of Leavenworth, in said State of Kansas, is possessed of and owns the said sum of two hundred and fifty thousand dollars fully paid up capital stock of said company.

The defendant, further answering the said bill of complaint,

says he has no information touching the inspection of said road and telegraph line by commissioners as is set forth in said complaint,
77 nor of the acceptance of the same by the President of the United States, nor of the issuance to said company of the bonds of the United States, as is set forth in said complaint, but defendant supposes it to be true as alleged by the complainants, and the defendant admits that the issuance of said bonds and the acceptance thereof by said company does thereby give to the government of the United States a mortgage upon said railroad and its franchises and property as is enacted in said acts of Congress, but this defendant avers that he is informed and that he verily believes that said railroad company has issued its first mortgage bonds on said railroad franchises and property thereof, as by the amendatory act of Congress, entitled "An act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes', approved July 1st, 1862," approved July 2d, 1864, said railroad company was entitled to do, and that the first lien of mortgage upon said railroad
78 is held and owned by divers persons, to this defendant unknown, holders of the bonds so issued as a first lien of mortgage on said road.

And the defendant denies that failure to pay said bonds so issued by the United States, or interest thereof, by said railroad company works a forfeiture to the United States of said railroad franchises and property, and this defendant avers that the failure to pay said bonds and interest only authorizes the Secretary of the Treasury to take possession of said road, together with its immunities, rights, functions, and appurtenances, and also all lands granted to said company by the United States, and still remaining in the ownership of said company, and that forfeiture of said road and franchises to the United States can only ensue by the failure to complete the roads mentioned in said act of Congress, so as to form a continuous line from the Missouri river to the navigable waters of the Sacramento river, in California, by the first of July, A. D. 1876. The defendant admits that under said act of Congress and the amendatory acts thereof, the said company is bound to proscribe its work as alleged in said bill of
79 complaint, to give the government of the United States preference as shippers over its road, and generally that said company are bound to comply with all the duties and obligations imposed by said acts of Congress.

The defendant denies that enforcement of the laws of the State of Kansas, with respect to the assessment and collection of taxes, will prevent or render unable said railroad company to meet its obligations to the United States; defendant avers that said railroad fixtures and other property of said Union Pacific Railway Company is assessed and taxed in the same way and to the same extent as is all the other property of individuals and corporations in said State of Kansas; that it is right and just that said railroad with its appurtenances

should be taxed and bear an equal burden of taxation with the other property owned and held in the State; that it would be inequitable for a corporation owing its existence and life to the constitution and laws of the State to evade bearing its due proportion of the
80 public burdens that are met by taxation. That the mortgage lien of the United States does not constitute the government of the United States part owner of said railroad and appurtenances.

The defendant admits that said railroad company may proceed to pay the taxes assessed on said road and appurtenances, and the defendant avers that said company was about to pay the taxes so assessed in said county of Jefferson when it was enjoined by the complainants from so doing. This defendant avers that the said company was amply able, and still is, to pay said taxes at the time they were levied; that its receipts for freight and passengers are large, amounting, as this defendant is informed, for the month ending April 1st, 1867, to upwards of ninety thousand dollars; that it has large bodies of land in the State of Kansas of great value; that said lands are in the aggregate, as defendant is informed and believes, worth the sum of three dollars per acre, and are upwards of one million of acres. The defendant admits that the State cannot interfere
81 with the obligations due from said company to the United States, and the defendant denies that the payment of taxes by said company does so interfere or impede said company in the performance of its duties.

The defendant avers that the complainants have invested their means in the said railroad and appurtenances for their own benefit and profit; that their claim that payment of the taxes due the State from said company will diminish their dividends on their shares in said company, really furnishes no excuse or reason why said company should be released from its share of the public burdens.

The defendant says that he is an entire stranger to all his co-defendants, and has no interest in common with them.

The defendant, further answering, says he has no knowledge of any application by said company to the legislature of the State of Kansas, as set forth in said bill of complaint, and that he cannot see how he is concerned therewith.

The defendant denies that said company have immunities from taxation by reason of said acts of Congress, or in consequence thereof.

82 The defendant denies that any of the operations of said company, or any of its obligations to the United States, will be embarassed by a due observance of the laws of the State to which it owes its existence and maintenance.

The defendant says he is informed and verily believes that the value of said road and appurtenances is more than double the lien upon it of the United States, and that the property so covered by mortgage to the United States is rapidly increasing in value.

The defendant denies that the payment of taxes by said company will compel it to largely increase its rates; but defendant alleges that

the rates of said company are largely in excess of any railroad in the west, and that the business of said road is already conducted, even in its present incohoate state, with large profits to the stockholders.

The defendant denies, that for any or all the reasons set forth in said bill of complaint, are the complainants entitled to the relief prayed for.

83 The defendant, as part of his answer herein, and which he asks may be so considered, attaches a copy, marked Exhibit A, of the tax roll of said Jefferson county, so far forth as it affects said railroad company; and the defendant states that the taxes therein specified were levied by the county commissioners of said county of Jefferson, under and by virtue of the laws of the State of Kansas; and that as county treasurer he was proceeding to collect said taxes when said bill was filed.

The defendant states that the property in said exhibit set forth was returned to the county commissioners of said county of Jefferson by the officers of said railroad company, as the personal property of said company in said county subject to taxation, and that there is no other taxes on said tax roll touching the property of said company.

All which matters and things this defendant is ready to prove and maintain as this honorable court shall direct, and he humbly

84 prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully expended.

WM. A. COY.
HENRY KEELER,
Solicitor for W. A. Coy.

THATCHER & BANKS,
Of Counsel.

STATE OF KANSAS, *Jefferson County, ss:*

Wm. A. Coy, of said county, makes oath and says that he is defendant herein answering; that he has heard and knows the contents of the foregoing answer by him subscribed; that the same is true of his own knowledge, except as to those matters stated on information, and as to those matters he believes it to be true.

WM. A. COY, *Co. Treas.*

Subscribed and sworn before me and in my presence by W. A. Coy, this third day of June, A. D. 1867.

In testimony whereof I have hereto set my hand and the seal of the district court of the third judicial district in and for said county, Kansas.

[SEAL.]

B. P. STANLEY,
Clerk of District Court.

85 Subscribed in my presence, and sworn to before me, John W. Day, probate judge in and for the county of Jefferson,

State of Kansas, by Wm. A. Coy, this 19th day of June, A. D. 1867.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the probate court of said county.

[SEAL.] JOHN W. DAY,
Probate Judge.

86

87 [Extract.]

Exhibit A.—Tax roll of Kaw tp., Jeff. co., Kan., for year A. D. 1866.

	Personal property.	State tax.	State school tax.	County tax.	Town tax.
U.P. R.R. Co., E. D.	$19,625	85 04	21 26	196 25	19 62

[Extract.]

Tax roll of Kentucky tp., Jeff. co., Kan., for the year A. D. 1866.

	Personal property.	State tax.	State school tax.	County tax.	Town tax.
U. P. R.R. Co., E. D.	$31,400	136 06	34 00	314 00	31 40

[Extract.]

Tax roll of Sarcoxie, tp., Jeff. co., Kan., for the year A. D. 1866.

	Personal property.	State tax.	State school tax.	County tax.	Town tax.
U. P. R.R. Co., E. D.	$19,625	85 04	21 26	196 25	19 62

Which said answer is endorsed in words and figures as follows, to wit:

Endorsed: No. 108. Circuit court U. S. district of Kansas. John Edgar Thomson et al. vs. James Blood, William A. Coy et al. Answer of defendant, Wm. A. Coy. Henry Keeler, solicitor for def't. Thatcher & Banks, of counsel. Filed June 3, 1867. A. S. Thomas, clerk.

88

89 And afterwards, to wit, on the 25th day of June, 1867, the Union Pacific Railway Company, eastern division, by their attorney, J. P. Devereaux, filed their answer in the clerk's office of the

circuit court of the United States for the district of Kansas, in words and figures as follows, to wit:

In the circuit court of the United States for the district of Kansas.

Answer U. P. R. W. C.

THE UNION PACIFIC RAILWAY COMpany, E. D.,
vs.
JOHN EDGAR THOMSON *et al.*

The Union Pacific Railway Company, E. D., by its solicitor J. P. Devereaux, for answer to so much of the bill of complaint as it is advised it is material and necessary for it to make answer unto, answering, says that it admits that the complainants are stockholders in said company in amount and manner and form as the complainants in their bill have alledged. That the said company did pay the taxes assessed by the county of Shawnee, in manner and form as is alledged in the bill, and that the counties of Wyandotte, Douglas, and Jefferson assessed the taxes upon said company as is alleged in said bill and that the defendants Funk, Blood, and Coy, as treasurers of said counties respectively, demanded payment thereof, and threatened to seize the property of the company and sell the same to enforce the payment of said taxes, and that under such menace and to avoid such seizure said defendants were reluctantly about to pay said taxes when restrained by order of this court. The defendant admits the lien of the United States upon said assessed property, as in the bill is stated, and that if the same is made subject to taxation under the laws of the State of Kansas, it will hinder, delay, and embarrass the defendants in the performance of its obligations and duties to the United States, and may entirely prevent the performance of the same, and thus defeat the objects and purposes of the government as expressed in the act of Congress refered to in said bill of complaint. That it will involve an increase of rates for freight and passengers, and possibly to such an extent that the company cannot compete with other modes of transportation. That said company accepted of the terms of said acts of Congress by the express consent of the State of Kansas, thereby, as these defendants insist, creating and implied and binding obligation on the party of the State to do no act and impose no burthen upon the company which should tend to defeat the will of Congress, or the lessening of the securities of the United States, and now having fully, and prays to be hence dismissed, &c.

JNO P. DEVEREAUX,
Solicitor.

Which said answer is endorsed in words and figures as follows to wit:

Endorsed: 108. Jno. Edgar Thomson et al., comp'ts, vs. Union Pacific Railway Co., E. D., et al. Defendants' answer. Filed June 26, 1867. A. S. Thomas, clerk.

And afterwards, to wit, on the 29th day of June 1867, the said defendants filed in the office of the clerk of the circuit court of the United States for the district of Kansas, their motion, which is in words and figures as follows, to wit:

In the circuit court of the United States for the district of Kansas, in chancery sitting.

Motion.

92 JOHN EDGAR THOMSON *et al.*, comp'ts,
vs.
THE UNION PACIFIC RAILROAD COMPANY, Eastern division—John M. Funk *et al.*, defendants.

Now comes the said defendant, John M. Funk, and moves the Hon. Samuel F. Miller, judge of said court, to dissolve the injunction heretofore allowed in the suit.

CHAS. S. GLICK,
Sol. for Defendant Funk.

W. C. MCDOWELL,
W. P. GAMBELL,
Of Counsel.

Which said motion is endorsed in words and figures as follows, to wit:

Endorsed: No. 108. Jno. Edgar Thomson et al. vs. Union Pacific Railway Company, eastern division, et al. Motion to dissolve injunction. Filed June 29, 1867. A. S. Thomas, Clerk.

93 And afterwards, to wit, at the May term of said court, 1868, an agreement was filed in said cause on the 1st day of June 1868, which said agreement is in words and figures as follows:

Circuit court of the United States for the district of Kansas.

Agreement

JOHN EDGAR THOMSON *et al.*, complainants,
vs.
THE UNION PACIFIC RAILWAY COMPANY, eastern division, and others, defendants. } 108.

It is agreed for the purposes of this suit that the sole question presented by the record and to be considered by the court is, whether under the laws of Congress and the statutes and resloves of Kansas as follows:

94

95 Resolved by the house of representatives of the State of Kansas, the senate concurring therein, That the Congress of the United States be, and is hereby, urgently requested to pass an act to secure the early completion of a railroad from the Missouri river to the Pacific ocean, by way of Fort Riley, as is more fully set forth in bill No. 262, introduced on the fifth day of February, 1862, into the United States House of Representatives, by the Hon. J. S. Rollins.

And whereas, the ratification of the treaty lately concluded, between the United States and the Pottowatomee Indian nation is indispensable to the construction of said railroad, therefore be it

Resolved further, That the Senate of the United States is urgently requested to ratify said treaty as soon as may be.

Resolved further, That our senators in Congress be instructed, and our representatives requested, to use every exertion to secure the objects sought in the foregoing resolutions; and be it

Resolved further, That the governor of the State of Kansas is hereby requested to transmit to our senators and representa-
96 tives in Congress certified copies of the foregoing resolutions, with the request that they immediately lay them before Congress.

HOUSE OF REPRESENTATIVES,
March 5, 1862.

The accompanying resolution, No. 14, memorializing Congress to pass an act to aid in completing a railroad from the Missouri river to the Pacific ocean, has been adopted by the senate and house of representatives.

Final passage, March 4.

JOHN FRANCIS,
Chief Clerk.

His Excellency Governor CHAS. ROBINSON.

I certify the within preamble and resolutions are a correct copy of the original, as on file in this office.

HENRY O. SHOALES,
Private Sec'y to his Excellency the Governor.

97 Whereas Congress, at the session of 1861 and 1862, passed an act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, which act was approved July 1st, 1862. And whereas section nine of said act provided that the Leavenworth, Pawnee, and Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific railroad of Missouri to a point on the 100th meridian of longitude, between the Platte and Republican rivers. And whereas it appears from the debates on the passage of said act, that the principal cities and towns in the Kansas valley were to be points in said road. And whereas the assignees of the Leavenworth, Pawnee, and Western Railroad

Company, represented by Samuel Hallet & Co., have not commenced said road on the Missouri river, at the mouth of the Kansas, but at a point on the Kansas river, above Wyandotte. And whereas said company, so represented, has surveyed and located said road to a
98 point three miles north of Lawrence, the largest city in the Kansas valley, and are surveying said road north of Topeka, the capital of Kansas, and are thus avoiding our cities, towns, and business centres, to the great injury of the people of the State as well as the Kansas valley. And whereas said company, so represented, are now demanding that the people of Wyandotte shall pay one hundred thousand dollars to make that city a point in said road. And whereas said company, so represented, are demanding a like sum of the people of Lawrence, on condition of being a point in said road. And whereas a like sum is demanded from the citizens of Topeka, the capital of our State, to secure it as a point in said road. And whereas we have good cause to believe that the same policy will be pursued as the road progresses west, and that the said Samuel Hallett & Co. demanded large sums of money and bonds from the people of cities and towns along the route of said road to build this road just where Congress intended it should be built. And this after Congress has placed in the hands of the company means sufficient to build the entire road.

99 Therefore resolved, 1st, By the house of representatives, the senate concurring therein, That Congress be earnestly requested to amend the act above refered to, so as to require the Leavenworth, Pawnee, and Western Railroad Company, or their assigns, to make Wyandotte, Lawrence, Topeka, Wabaunsee, Manhattan, and Junction City points on said road.

Resolved, 2nd. That the President of the United States be respectfully urged to withhold his approval of the location of said road, unless Wyandotte, Lawrence, Topeka, Wabunsee, Manhattan, and Junction City are made points in said road. Provided that nothing in these resolutions shall be construed or understood to affect the original act of the Territory of Kansas, entitled "An act to incorporate the Leavenworth, Pawnee, and Western Railroad Company, or to affect the location of the road commencing in Leavenworth, provided for in said act.

Resolved, 3rd, That our senators be and are hereby instructed and our representative requested to use every honorable means to secure the above proposed amendment to said location.

Resolved, 4th. That the secretary of state be directed to
100 send an official copy of this preamble and resolutions to each of our senators and representative in Congress, to the President of the United States, also to the President of the Senate and Speaker of the House of Representatives, with a request to present the same to their respective bodies.

Adopted by the house, and senate amendments concurred in March 1, 1864.

ALEX. R. BANKS, *Chief Clerk.*

Concurred in by the senate on the 1st day of March, A. D., 1864.

JOHN T. MORTON, *Sec. of Senate.*

I, R. A. Barker, sec. of state, do hereby certify that the foregoing is a true and correct copy of the original concurrent resolution on file in this office.

[SEAL.] R. A. BARKER, *Sec. of State.*

101 Whereas, the aid heretofore granted by Congress, at the instance of the State, for the extension of the Union Pacific Railway Company, eastern division, is insufficient to enable the company to construct said road to its junction with the line from Omaha as rapidly as the interests of the State and the nation require.

And whereas the amount of government service performed, and the income of the portion of the road already completed, affords a reasonable guarantee that further aid may be safely granted, without the probality of loss to the United States, therefore be it

1st. Resolved by the house of representatives of the State of Kansas, the senate concurring therein, That the matters aforesaid be respectfully presented to Congress with the urgent request that further aid be granted to the said railway company, upon such terms and conditions as will secure the government against loss and assure the speedy construction of said railway to its junction with the line from Omaha.

2nd. That our senators in Congress are instructed and our representative requested to use every exertion to secure the object sought in the foregoing resolution.

102 Adopted by the house of rept. Feb. 1, 1867.

JOHN T. MORTON, *Chief Clerk.*

Concurred in by senate February 9, 1867.

A. R. BANKS, *Secretary.*

I, R. A. Barker, sec. of state, do hereby certify that the foregoing is a true and correct copy of the original concurrent resolution on file in this office.

In testimony whereof, I have subscribed my name and affixed the great seal of the State, this 28th day of May, 1868.

[SEAL.] R. A. BARKER, *Sec. of State.*

103 Whereas the extension of the Union Pacific railway, eastern division, "through the Territories of New Mexico and Arizonia, and making a connection by way of Denver City with the northern road from Omaha, is demanded by an enlightened public sentiment, a just regard to population, representation, and territory; the speedy, economical, and permanent settlement of our Indian difficulties, the rapid developement of the richest mineral regions; the reduction of the large appropriations now necessary to the maintainance of our forts and the efficiency of our military service on the plains; the continuance and preservation of our existing friendly relations with our neighboring sister republic, and the unity and the indivisibility of our own people,

Therefore, be it resolved, by the senate of the State of Kansas, (the house of representatives concurring therein,) That the extension of the eastern divisiou of the Union Pacific railway to the Pacific coast along the central route, which recent surveys have shown eminently practicable, is alike demanded by the necessity of our national progress, sound public policy, and justice to all
104 parts of the Union, and that to this end the same subsidy in lands and bonds should be granted to this road as has already been given to the line from Omaha.

Resolved further, That in view of the present subsidy on the line of the eastern division expiring upon the completion of some fifty additional miles west of the present termini:

That our senators in Congress be instructed, and our representative requested, at the earliest practicable period to respectfully and earnestly present this important (especially to the people of Kansas) subject to the Congress of the United States, so as to procure such legislation as is necessary to the successful prosecution of this great central railway to the Pacific.

Resolved, That certified copies thereof be at once forwarded to each of our senators, to our representative, and to the President of the Senate and Speaker of the House of Representatives of the Congress of the United States.

Adopted by the senate Jan. 27, 1868.

E. C. MANNING,
Sec. of Senate.

105 Concurred in by the house of representatives February 7, 1868.

JOHN T. MORTON, *Chief Clerk.*

I, R. A. Barker, sec. of state, do hereby certify that the foregoing is a true and correct copy of the original concurrent resolution on file in this office.

In testimony whereof I have subscribed my name and affixed the great seal of the State this 28th day of May, 1868.

[SEAL] R. A. BARKER, *Sec. of State.*

The property of the defendant and the Union Pacific Railway Company, eastern division, in the bill specified is liable to be taxed for State, county, and municipal purposes. And the facts alledged in the bill and necessary to raise this question are admitted to be true, and the allegations in the answers necessary to show that said taxes have been laid and assessed in conformity to the statutes of Kansas are admitted to be true. Agreed also, the company have
106 executed a first mortgage as authorized by the 10th section of the act of Congress July 2, 1864. And the annexed table "A" is correct statement of income and expenses for the time named in it. All other questions and exceptions relating to omissions

or informalities or otherwise, which might effect the adjudication of the above-mentioned sole question are waived.

The cause is set down for hearing on bill answered and this agreement.

J. P. USHER, *For Compl'ts.*
THATCHER & BANKS,
For Blood & Coy.
JESSE COOPER,
For J. M. Funk.
JOHF P. DEVEREAUX,
For Defendants, The Union Pacific Railway Co., E. D.

Which said agreement of parties in endorsed in words and figures as follows, to wit:

Endorsed: 108. John Edgar Thomson et al vs. The Union Pacific Railway Company, eastern division. Agreement of parties. Filed June 1st, 1868. A. S. Thomas, clerk.

107 *Union Pacific Railway, E. D.—Earnings and expenditures for year commencing March 1st, 1857, and ending February 20th, 1868.*

[The following table gives the earnings for each month of the year, the business from whence derived, the average number of miles operated, and earnings per mile per month.]

EARNINGS.

Month.	Government.	Commercial.	Contractors.	Miscellaneous.	Total.	Miles operated.	Earnings per mile.
1867.							
March	$34,864 98	$52,964 49	$1,704 77	$5,308 94	$94,843 18	170.55	$556 10
April	21,002 02	69,610 35	10,357 60	2,814 79	103,784 76	176.75	587 18
May	51,230 90	101,443 55	13,504 12	5,927 71	172,106 28	217.05	792 03
June	38,980 04	67,320 29	11,943 52	4,062 80	122,306 65	217.05	563 50
July	64,545 46	101,948 03	19,790 11	3,286 99	189,570 59	239.40	791 86
August	87,100 72	121,194 60	24,381 71	3,890 77	236,567 80	255.55	925 72
September	29,669 00	88,337 51	44,367 02	5,542 53	167,916 06	255.55	657 01
October	81,517 59	155,782 36	24,388 21	5,483 04	267,171 20	255.55	1,045 48
November	40,922 56	102,761 30	40,515 49	6,057 39	190,256 74	286.35	664 42
December	34,591 12	83,940 33	21,846 74	3,918 89	144,297 08	321.55	448 75
1868.							
January	14,973 85	61,691 10	13,202 62	2,955 97	92,823 54	367.55	252 55
February	11,970 80	64,889 53	24,966 23	383 32	102,209 88	367.55	278 08
Total	511,369 04	1,071,883 44	250,968 14	49,633 14	1,883,853 76	260.58	7,229 46

109 The operating expenses have been as follows:

OPERATING EXPENSES.

Month.	Conducting transportation.	Motive power.	Maintenance of cars.	Maintenance of way.	General expenses.	Total.
1867.						
March	14,357 51	12 616 21	5,427 45	27,253 75	4,005 10	63,660 02
April	19,486 56	15,194 61	4,312 89	30,675 40	7,517 47	77,186 93
May	33,440 52	21,114 23	7,057 92	36,063 19	3,222 39	100,898 25
June	23,625 41	18,050 27	4,393 48	38,015 64	3,674 12	87,758 92
July	31,398 76	26,137 03	4,569 54	38,217 10	4,108 34	104,430 77
August	26,705 74	30,848 95	4,498 69	37,078 49	3,528 45	102,660 32
September	45,366 42	31,808 99	6,223 06	54,108 69	4,946 70	142,453 86
October	34,382 02	33,905 87	6,216 02	42,328 29	3,313 86	120,146 06
November	41,340 28	45,621 14	6,339 55	45,175 44	4,631 71	143,108 12
December	40,688 27	49,520 06	9,376 15	46,113 88	4,497 97	150,196 33
1868.						
January	24,217 78	36,650 24	6,270 92	24,316 43	3,986 05	95,441 42
February	25,035 59	34,450 12	6,037 82	18,120 82	6,033 34	89,677 69
Total	360,044 86	355,917 72	70,723 49	437,467 12	53,465 50	1,277,618 69

The total earnings were	$1,883,853 76
" " operating expenses were	1,277,618 69
" " net earnings	606,235 07
Average length of road operated	260.58 miles.
" earnings per mile operated	$7,229 46
" expenses " " "	4,902 98
" net earnings " "	2,326 48
Proportion of expenses to earnings	68 48-100 per cent.

110

111 At a term of the circuit court of the United States in and for the district of Kansas, begun and held at Topeka, in said district, on Monday, the twenty-fifth day of May, in the year of our Lord one thousand eight hundred and sixty-eight, proceedings were had in said case and an order signed, filed, and entered herein, which said proceedings and order are in words and figures as follows, to wit:

JOHN EDGAR THOMSON *et al.*
vs.
THE UNION PACIFIC RAILWAY CO., EASTern division, and others. } 108. In chancery.

This day this cause came on to be heard upon the bill, answers of defendants, and the agreed statements of facts made by the parties, and in the hearing of the case it arose, as to question to be determined, whether the property of the railway company, defendant in this case, described in the bill, was subject to the tax which the

statutes of Kansas authorized to be levied on all other property, not specially exempted for State, county, and municipal purposes;
112 on which question the judges of the circuit court being divided in opinion, it is ordered that the same be certified to the Supreme Court of the United States, as required by law.

SAM. F. MILLER.
MARK W. DELAHAY.

Said proceedings and order is endorsed in words and figures as follows, to wit:

Endorsed: 108. John Edgar Thomson et al. vs. The Union Pacific Railway Company, eastern division, et al. Filed June 1, 1868. A. S. Thomas, clerk.

113 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true and correct copy and transcript of the record and proceedings in a cause pending in said court, wherein John Edgar Thomson et al. are complainants against The Union Pacific Railway Company, eastern division, John M. Funk, James Blood and William A. Coy, defendants.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at my office, in the city of Topeka, in said district, this 11th day of November, A. D. 1868.

[SEAL.] A. S. THOMAS, *Clerk.*

Supreme Court of the United States.

DECEMBER TERM, 1869.

J. E. THOMPSON AND OTHERS

vs.

THE KANSAS PACIFIC RAILROAD COMPANY AND OTHERS.

POINTS OF COMPLAINANTS.

FIRST.

The Territorial Legislature of Kansas had the power to grant the charter to the Leavenworth, Pawnee, and Western Railroad Company. (Sec. 24 of Kansas-Nebraska act, 10 Stats., pp. 285, 286; 11 Martin's La. Repts., 309; 7 Wend., 539.)

In the case of Williams *vs.* The Bank of Michigan, 7 Wend., 556, Senator Sherman, speaking of the powers of the Governor and Council of Michigan Territory to grant the charter to the bank, said, "It may be considered the act of Congress, declared through its agent." The Territorial Legislature of Kansas was the agent of Congress.

SECOND.

The railroad company did not receive any of its powers from the State. When Kansas was admitted into the Union the corporation was an artificial body, possessing franchises bestowed by Congress through its agent, to be exercised within the limits of that State and in Colorado.

This corporation owed no allegiance to the State, and the conferring upon it of additional powers by Congress, was not a violation of any of the rights of the State.

First, because the powers conferred were to carry out the constitutional powers of Congress, and Congress could as well employ a corporation as an individual, to carry out those powers.

Second, because the State of Kansas, by its repeated resolves, waived all rights of objection, if any existed, to the adoption of the corporation by Congress to carry out those powers.

statutes of Kansas authorized to be levied on all other property, not specially exempted for State, county, and municipal purposes;
112 on which question the judges of the circuit court being divided in opinion, it is ordered that the same be certified to the Supreme Court of the United States, as required by law.

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[SEAL.] A. S. THOMAS, *Clerk.*

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This corporation owed no allegiance to the State, and the conferring upon it of additional powers by Congress, was not a violation of any of the rights of the State.

First, because the powers conferred were to carry out the constitutional powers of Congress, and Congress could as well employ a corporation as an individual, to carry out those powers.

Second, because the State of Kansas, by its repeated resolves, waived all rights of objection, if any existed, to the adoption of the corporation by Congress to carry out those powers.

THIRD.

The United States have a property interest in the road in the following particulars:

First, the two hundred feet occupied by the company for the right of way, which the company can only occupy so long as it complies with the conditions of the law.

The company's right, is the right to use in a specific manner, failing in which its right to the possession is forfeited. The fee is not granted to the company.

Second. The United States have sixteen thousand dollars per mile money interest in the road, failure in the payment in the manner prescribed by the acts of Congress, also vests by law, all the property sought to be taxed, in the United States.

Note. It is to be remembered that when the United States adopted this corporation, it did not possess any tangible property whatever. It was a mere naked corporation, the only valuable thing which it possessed, was the franchise to be a corporation, which was conferred through the power of Congress.

FOURTH.

Kansas, by compact, cannot tax the property of the United States. See act of Congress for the admission of Kansas approved January 29, 1861, (12 statutes, p. 126.) The words are, "and that the said State shall never tax the lands *or the property* of the United States in said State."

This act for the admission of Kansas was approved by joint resolution of the Legislature of the State, January 20, 1862. (Kansas Laws, 1862.)

FIFTH.

Sec. 20 of the tax laws of Kansas contains the following proviso: "That nothing in this section shall be so construed as to tax any stock or interest in any joint stock company held by the State."

Now, by the charter, (sec. 16,) the State has an interest in the road, in this, to wit, the right to purchase said road at the end of fifty years upon a valuation.

4 Metcalfe, 564.

SIXTH.

But independent of these considerations, Congress undertook, in the passage of the act of 1862 and subsequent acts relative to this road, to exercise the powers delegated to it under the eighth section of the first article of the Constitution, and under the authority of that section, as a regulation of commerce it has been decided, that the power to regulate commerce is as extensive upon land as upon water. (The Propeller Genessee Chief and others *vs.* Fitzhugh and others, 14 How., 452.) It will be observed that Justice Daniel dissented from the decision of the Court in this and the following cases in which the same principle was involved:

New Jersey Steam Navigation Co. *vs.* Merchant's Bank, 6 How., 344.
Whitney *vs.* Clark, 5 How., 441.
Newton *vs.* Stubbs, 10 How., 586.
Allen *vs.* Newberry, 21 How., 248.

And in Scaright *vs.* Stokes, 3 How., 180, he said: "Congress does does not possess the power, under the Constitution, to construct roads, or any internal improvements in the States." This idea, so often enunciated by a minority of the court, and adhered to and maintained by the politicians in one section of the United States, led to and caused the late civil war, in the midst of which this system of roads was provided to be built, for the overthrow of those doctrines, the declared purpose of which was to regulate commerce among the several States, to establish post roads, and to provide for the moving of the armies of the United States, and transporting the supplies and munitions of war of such armies. And if Congress had the right for either or any of those purposes, to provide for the construction of this road, by devoting to its use the right of way, its lands or its money, and has done it, by means whereof the road has been built, and made subject to the use of the United States, the property of the corporation, is beyond the power of Kansas or any other State to lay any burden upon it, by taxation or otherwise.

Society for Savings *vs.* Coite, 6 Wall., 605, and cases cited.

SEVENTH.

All other questions aside, it cannot be denied that this is a post road established by Congress, its courses are designated by law all the way from the mouth of the Kansas river to Denver, in Colorado. These courses were not designated in the charter of the company, and Congress possessed the undoubted

power to establish post roads. (See 3 Story's Commentaries on the Constitution, p. 149 and 150.)

This road is built upon the lands of the Government, passing in its course over divers Indian and military reserves, the company having no right thereto, except the use, which will be forfeited the moment the company fails to comply with the conditions of the grant. The rolling stock appertains to the whole line, the Government lands as well as the reserves, and now, can the roadway and rolling stock be seized and sold by the authority of any State?

EIGHTH.

It is true the United States might elect to consider the company its debtor for the money advanced in aid of building the road, and it is not improbable that they will do so, when the money is due, at the end of thirty years, but if so, the obligations of the company to the United States will not be ended. The property in the right of way will still remain in the United States, and the possession of the road in the company will forever remain upon condition of performing its express obligations to the Government.

NINTH.

The same rule which applies to the Union Pacific Railroad Company must be applied to this and all the other roads provided for by the acts of Congress under consideration. All through the acts they are treated as one system of roads. Any two or more of the companies had power to consolidate, (section 16, act of 1862,) and any one of them might build the whole line of road to the Pacific, or from the Pacific to the Missouri river, if the companies designated to perform such work should, for any cause, fail. (See section 16 of the act of 1864.)

Supreme Court of the United States.

DECEMBER TERM, 1869.

J. EDGAR THOMSON, ET AL.,

vs.

THE UNION PACIFIC RAILWAY COMPANY, E. D., ET AL.

J. P. USHER,
Counsel for Complainants.

Judd & Detweiler, Printers, Corner Penn. Avenue and 11th street.

Supreme Court of the United States.

DECEMBER TERM, 1869.

J. EDGAR THOMSON, ET AL.,

vs.

THE UNION PACIFIC RAILWAY COMPANY, E. D., ET AL.

By the 20th section of chapter 118 of the "*tax laws*" of the State of Kansas, being an act entitled "An act to provide for the assessment and collection of taxes, approved February 20, 1866," provision is made for the assessment, for taxation, of railroads within that State. The assessment is upon the "value in money" of the "track, road-bed, water and wood stations, and such other realty as is necessary to the daily running operations of the road within the limits of the right of way," &c. This property, by the 2d section of the act, is declared to be real estate. The 20th section also provides for the assessment of the moveable property, which, by the 2d section, is classified as personal property. By the 65th section of the act, it is provided that if the taxes on lands are not paid before the 10th of January in each year, a penalty of 10 per cent. shall be added, and the property shall be subject to sale, as thereinafter provided. By the 89th section provision is made for a deed to the purchaser or holder of the certificate, which shall vest in the grantee "an absolute estate in fee simple."

The 95th section provides for enforcing the collection of taxes assessed upon personal property. A warrant to the sheriff is to be issued, and he is required to levy the amount thereof upon

the goods and chattels of the delinquent. It will appear from an inspection of this act, that, in one or the other form, the entire property of a railroad company is liable to be seized and sold for taxes, vesting in the purchaser, by reason of such sale, the absolute title to the property.

The property is not to be sold as an entirety, but the proper officer of such county is to sell so much thereof as may be necessary for the payment of the tax assessed by his county. In pursuance of this act, the counties of Wyandotte, Douglas, Jefferson, and Shawnee, in the State of Kansas, assessed the respective portions of the railroad of the defendant, situate in said counties, and levied a tax thereon. The railway company paid the tax assessed by Shawnee county, and was about to pay the taxes assessed by the other counties when, at the instance of several stockholders, complainants in this cause, an injunction was issued out of the circuit court for the district of Kansas, enjoining the payment of the taxes until the further order of the court. The cause came on to be heard, and the judges being divided in opinion upon the question whether the railroad and its equipments were liable and subject to be taxed under the said laws of Kansas, the cause, upon that question, was certified into this court.

The question to be considered is one of the gravest importance, not so much to the complainants, in this case, as to the railroad companies organized and deriving their powers under the acts of Congress providing for the construction of the Union Pacific Railroad and its branches, and the States, Territories, and municipalities through which said roads pass, and that shall hereafter be formed or created along their course.

These roads have their eastern termini one hundred and fifty miles east of the geographical centre of the domain of the United States, and though we may not reasonably anticipate a population as dense as that east of the Missouri river, yet we expect that all the country will be inhabited, and that every part and parcel of the roads will be within the control of and subject to local law, and the capriciousness of those who shall make and

execute those laws, unless, indeed, by the law of their being they are exempt from such control.

Generally it is admitted that the State may lawfully tax all the property within the State, and that the party excepting to the tax is bound to show that for some sufficient reason the property is exempt. It is insisted that this property is exempt for two reasons. First—a minor one—because by the sixteenth section of the charter of the company the State has the right to purchase the road at the end of fifty years. The section is as follows:

> SEC. 16. Said company shall keep a fair record of the whole expense of constructing said road, and at the end of fifty years the State or States through which the said road shall pass shall be at liberty to purchase said road by paying to said company the amount at which it shall be valued at by persons to be mutually chosen by the State and by said company; but two years' notice shall be given to said company of the intention of the State to purchase said railroad.

The State has therefore an interest in the road—a special property—and by its fundamental law cannot tax it. See also 4th Metcalf, 564, a tax case; an ultimate contingent right makes the road State property.

Second. The great and absorbing reason for such exemption is, because this road is one and a part of a system of roads constructed under the direction and authority of Congress for the use and purposes of the United States, and authorized to be made by Congress in the exercise of the powers delegated under the eighth section of the first article of the Constitution of the United States.

It is claimed that under the subdivisions of that section of the Constitution which authorizes Congress to "provide for the common defence and general welfare of the United States"—

"To regulate commerce among the several States,"

"To establish post offices and post roads,"

"To raise and support armies,"

And "to suppress insurrections and invasions,"—

The act entitled "*An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the using the same for*

postage, military, and other purposes," passed July 1, 1862, (12 Stat., p. 489,) and the amendments thereto, were authorized by the Constitution, and that by and under these acts, the United States has a large special property interest in the roads built under them, including the Union Pacific Eastern Division, now in judgment; and that this road and all of that system of roads mentioned in said acts, are the designated and recognized "*means* "employed by Congress to carry into execution the powers "conferred by the Federal Constitution," and if we are correct in this position—if the property interest in the road, and right to its use by the Government as a *means* of carrying into execution its acknowledged powers is absolute, then it is clear, and it must be held, that the State of Kansas cannot be permitted to exercise the power of taxation over it, and the question now before the Court must be resolved in the negative.

Before proceeding to the consideration of what property interest the United States has in the road, and right to the use thereof, as a means of carrying out the acknowledged powers of Congress, it may be well to ascertain whether it is certain that Congress had the power to make a law providing for the construction of a railroad for the purpose of securing the objects specified in the title, viz: "*to secure to the Government the use of the same for postal, military, and other purposes.*"

Story says, (3d Com. on Const., p. 149,) "Congress may authorize the making of a canal, as incident to the power to regulate commerce." "For the same reason," (p. 150,) "may authorize the laying out and making a military road; may acquire the right of soil for such purpose; and, as incident thereto, they have power to keep the road in repair and *prevent all obstructions thereto.*"

At one time or other, much has been said upon the scope of the powers of Congress, conferred by the eighth section of the first article of the Constitution; but nothing has ever been said or produced more simple or logical, or more to the point, than the above expression of Mr. Justice Story. The power to raise, or create, or establish, is the power to continue, preserve, and use.

To give the power to establish post offices and post roads, and not allow them to be put in repair or kept in condition to use, is to give a power in vain.

If Congress may declare war and not conduct it, or raise armies and not command them, nor provide for their transportation, with their arms, munitions of war, and supplies, the power is useless.

And so the power to regulate and maintain commerce between the people of the different States, between the valley of the Mississippi and the Pacific coast, without at its will commanding the means by which such commerce shall be maintained, is mere contradiction. The power to establish post offices and post roads, and transport the mails, is not limited to any locality, nor in respect to the kind or quality of the road, or means of conveyance.

The war power has recently vindicated its necessity, as well as the extent of its usage. During the rebellion which appeared in nearly half the States of the Union, the power was exercised according to exigency, and has been, in all courts and other places, justified; and it was at the time when the national necessity for military roads was being written in characters of blood that provision was made by Congress for building these roads; and that their object might not be misunderstood, it was declared in the eighteenth section of the act as follows: "And the better to accomplish the object of this act, namely, *to promote the public interest and welfare* by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, (*but particularly in time of war,*) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said *companies* named herein, alter, amend, or repeal this act." And by this same section, in another part, as a regulation of commerce, it was provided that the rates of transportation, in certain contingencies, should be fixed by Congress.

Whatever may be uncertain in this cause, it is certain that Congress, in the passage of the acts providing for the construc-

tion of these railroads, professed to act, and believed they were acting within the powers delegated to them, and that, by these acts, there was secured to the United States, all that the title and the repeated declarations to be found throughout the body of the acts professed to secure. And if Congress accomplished what it attempted to do; if, by these acts, the United States has an unqualified property interest in the road, and in their use, with the power to regulate and control their operations as a *means* to carry into execution the powers conferred upon Congress by the Constitution, the case must be with the complainants.

To properly understand this part of the case we must examine with some care the act of July 1, 1862, and the several acts amendatory thereof; and the condition of the nation at the time of the passage of the acts is also to be considered, in order to the proper understanding of the meaning of the acts, and the intention and purpose of Congress. (3 How., p. 1.) We know that for many years the necessity of a Pacific railroad was pressed upon Congress through conventions and petitions; that in the Chicago Convention the party about to become dominant, declared it to be the duty of Congress to provide for the construction of the road. At the date of that convention, the commercial and postal advantages of such a road may have been most prominent in the public mind; but upon the breaking out of war its necessity to the Government as a means for the preservation of its authority over all its territory upon the Pacific coast became so apparent, that provision was made for building the road, at a time when the expenditures of the Government were more than a million of dollars per day for carrying on the war; and when, two years afterward, it was found that the work had languished because of the inadequacy of Governmental assistance, additional aid was given by Congress to secure the speedy construction of the work; and this, though the nation was then daily expending larger sums in carrying on the war, and though its debt had increased by hundreds of millions. Is it to be now held that all this action of Congress was mere pastime, a purposeless, not to say profligate use of the lands and credit of the

United States for the benefit of divers corporations beyond the control of Congress, the United States to be placed in the relation to them of a simple contract creditor, confined to such remedies as the laws of the numerous States and Territories traversed by the road and its branches afford? If so, all the people are at fault in their understanding of the law, and the often repeated declarations of Congress in the acts specifying their object are meaningless words.

We all know, everybody knows, and none better than the people of Kansas, (see their legislative resolutions of 1867 and 1868,) why this military, postal, and commercial road was made. It was in the midst of war—civil war. It came out of the throes of the great rebellion. It was by the Kansas resolves designed to promote "*the unity and indivisibility of our own people.*" It was to stretch forth the hands of the great valley until they clasped in peace and unity the hands of Oregon and California. It was to bind and cement in indissoluble bonds a dissolving Union. It was to carry the mails "safely" and "speedily" to the people inhabiting half of all the national domain. It was to transmit telegraphic dispatches to all these people with the rapidity of thought. It was to send troops and munitions of war to protect the defenceless men, women, and children of the frontier, against Indian barbarities. It was to enable the landless to have homes of their own. It was to develop and convert to the national uses the vast stores of gold and silver, and other valuable minerals imbedded in the mountains, and inaccessible, but by these and other roads. It was to enable the Government to suppress insurrections and repel invasions, should any occur, in all the country west of the mountains, and it was through the instrumentality of these roads, that the people were to be brought into easy, cheap, and frequent communication with each other, whereby they should live together in lasting harmony and peace. To say the least, it is a short-sighted and ungenerous spirit, which fails to appreciate a work which, more than any other ever undertaken by the Government, tends to consolidate peace, and to maintain the dignity, and reflect the glory of the nation.

Proceeding now to a somewhat careful examination of the laws and their object, we find that the first section of the act of July 1, 1862, authorized the construction of a railroad westward to the western boundary of Nevada Territory from the 100th meridian; and by other provisions of the act the line west of Nevada was, by a California corporation, to be constructed to the Pacific ocean. It also provided for the construction of *five* branches from the Missouri river, two of them, viz: the Union Pacific, E. D., defendant, and the branch from opposite Iowa, the Omaha line, were to be extended and unite with the main line on the 100th meridian, and all the other branches were to be united and connect so as to form a complete and united system of railroad. These branches from the Missouri river commence at Sioux city, in Iowa, and end at the mouth of the Kansas river, in Kansas. They cover the Missouri from the great bend of the river at Sioux city, where the river deflects south from its long eastern course, to the mouth of the Kansas river, (distant about 240 miles from Sioux city,) where it makes its second great bend, running thence east to its junction with the Mississippi. These five branches, viz: the Sioux city, the Omaha, the Hannibal and St. Joseph, the Leavenworth branch, and the Union Pacific Company, E. D., defendant, from the mouth of the Kansas river; and another, the Burlington and Missouri river, authorized by the amendatory act of July 2, 1864, connect with trunk-line roads leading from the east to the Missouri river, and which roads cover all the country between the lakes on the north, and the Ohio river to its mouth on the south.

The two main branch lines of the Union Pacific road, as has been seen, and which connect with all these eastern roads, are the Omaha, by the Platte River Valley and the Eastern Division, now, by act of Congress, known by the name of the Kansas Pacific, by the Kansas river. At the time of the passage of the acts of 1862 and of 1864, there were no railroads constructed from the East to Omaha, or to the mouth of the Kansas river. The Hannibal and St. Joseph railroad was the only one completed to the Missouri river. Now three trunk lines have reached each of these points, six in all, two of them unite with the Kan-

sas Pacific by means of a substantial and costly bridge over the Missouri. Additional roads are being constructed rapidly east of the Mississippi, all pointing to the mouth of the Kansas river or to Omaha. These two points are so advantageously situated that they command and accommodate the international commerce of all the country east of the Mississippi, thus vindicating the wisdom of Congress in providing for these roads, and verifying the declaration made in the several acts passed, that the roads would be promotive of the "*public welfare*." This system of roads, now nearly complete, has not only created trade, but has so attracted the commerce of the country, which formerly went by ocean, as to affect and sensibly diminish that mode of travel and carriage; and, as was anticipated, the commerce of China and Japan is already being attracted to this route. And that Congress intended to provide for this commerce, and to encourage and protect it, we have but to refer to the 15th section of the act of July 2, 1864.

SEC. 15. *And be it further enacted*, That the several companies authorized to construct the aforesaid roads are hereby required to operate and use said roads and telegraph for all purposes of communication, travel, and transportation, *so far as the public and the Government are concerned, as one continuous line;* and in such operation and use to afford and secure to each equal advantages and facilities as to routes, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others."

In considering the care of Congress upon this subject, we are not to forget, that by the fourteenth section of the act of 1862 it was provided, that "the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel, and transportation, so far as the public and the Government are concerned, as one connected, continuous line." And, as if some doubt might arise as to what was intended by the foregoing paragraph, the fifteenth section was enacted in 1864. Can anything be more certain than that Congress intended to regulate the commerce that shall pass over these roads?

Examining now more in detail these acts, we find that section two of the act of 1862 grants the right of way, one hundred feet

in width on each side of the track, with timber, stone, &c., for the construction of the road, and binds the United States to extinguish the Indian title to lands. By section third, "for the purpose of aiding in the construction of said road and telegraph line, *and to insure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon*," there is granted every alternate section of public land designated by odd numbers to the amount of five sections on each side of the road; this grant being, by the fourth section of the act of July 2, 1864, increased to ten sections.

For convenient reference, sections 3, 5, 6, 17, and 18, of the act of 1862, are here inserted, omitting some immaterial paragraphs:

SEC. 3. *And be it further enacted*, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

SEC. 5. *And be it further enacted*, That for the purposes herein mentioned, the Secretary of the Treasury shall, upon the certificate in writing of said commissioners of the completion and equipment of forty consecutive miles of said railroad and telegraph, in accordance with the provisions of this act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years from date, bearing six per centum per annum interest, (said interest payable semi-annually,) which interest may be paid in United States Treasury notes, or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall *ipso facto* constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and descrip-

tion, and in consideration of which, said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required to do so by the Secretary of the Treasury, *in accordance with the provisions of this act*, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States. * * * *

SEC. 6. *And be it further enacted*, That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government, whenever required to do so by any department thereof, and that the Government shall at all times have the preference in the use of the same, for all purposes aforesaid, (at fair and reasonable rates of compensation, not to exceed the amount paid by private parties for the same kind of service;) and all compensation for services rendered for the Government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.

SEC. 17. *And be it further enacted*, That in case said company or companies shall fail to comply with the terms and conditions of this act, by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same, for an unreasonable time, to remain unfinished, or out of repair, and unfit for use, Congress may pass an act to insure the speedy completion of said road and branches, or to put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default or neglect of such company or companies. * * * * * *

SEC. 18. *And be it further enacted*, That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs and the furnishing, running, and managing of said road, shall exceed ten per centum upon its cost, exclusive of five per centum to be paid to the United States, Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act.

It will be seen, upon an examination of these sections 17 and 18, that Congress apprehended that for some unforseen cause the roads might not be built, or for the want of some additional provisions than were made in the act of 1862, and being intent upon having a road, these sections were inserted, taking care, again, in these sections to declare the object of the law. And in pursuance of such expressed powers, Congress did, on the 2d July, 1864, pass an amendatory act, whereby, in section 4, the aid was increased by doubling the grant of lands, and the subsidy in United States bonds was made subordinate to a mortgage to be executed by the companies to secure the like amount in bonds, which the companies were authorized to issue. This is provided in section 10 of the act of 1864, which is as follows:

SEC. 10. *And be it further enacted*, That section five of said act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road, may, on the completion of each section of said road, as provided in this act, and the act to which this is an amendment, issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property, and equipments, except as to the provisions of the sixth section of the act to which this is an amendment, relating to the transmission of dispatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States. And said section is further amended by striking out the word "forty," and inserting in lieu thereof the words "on each and every section of not less than twenty."

The provision for withholding a portion of the bonds, by section seven of that act was repealed, and by section five it was provided—

"That only one-half of the compensation for services rendered for the Government by said companies shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said road."

Down to the time of the passage of this act, the prosecution of the enterprise of building the road had languished—but little had been done; but the foregoing and other favorable provisions made by Congress in the law of 1864, secured the speedy con-

struction and completion of the Union Pacific and Central Pacific roads, and the Kansas Pacific is now far advanced, there being at this time only about two hundred miles of road to build, when it will be connected, at Cheyenne, with the line from Omaha, and thereby become an effective part of the great scheme and system of railroads provided for and vitalized by these and other acts of Congress.

Sufficient reference has already been made to the acts to show that it was not the intention of Congress to make a gratuity to the companies of these large grants of land and bonds of the Government; but the intent is clear and manifest, that, in the judgment of Congress, a sufficient consideration was to be given to the Government for the aid extended by these grants; and, that the Government should not be disappointed, ample provision was made for security and indemnity to it, to be taken as Congress should determine best for the Government, "having due regard to the rights of said companies." (See sec. 18, act of 1862.)

Congress was no less mindful of the right of the United States in providing of the repayment by the companies of the money (bonds) advanced in aid of the construction of the roads.

By the fifth section of the act of 1862 "the delivery of said bonds to the company" *ipso facto* constituted a so-called first (by the act of 1864 a second) mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued; "*and on the refusal or failure of said company to redeem said bonds or any part of them when required to do so by the Secretary of the Treasury,* IN ACCORDANCE WITH THE PROVISIONS OF THIS ACT, the said road, with all its rights, functions, immunities, and appurtenances thereto belonging, and also all lands granted to said company by the United States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States."

This security, though called a mortgage, is *sui generis*—not a

Kansas mortgage, nor yet a mortgage known to the common law, subject to judicial foreclosure with rights of redemption. The defaulting company has no day in court—the failure to perform all the duties and obligations to the Government imposed by the acts of Congress works a *forfeiture* in the nature of a *penalty*, and cannot be relieved against in equity. Taylor *vs.* Carondelet, 22 Missouri, p. 111, and cases cited; State of Md. *vs.* B. & O. R. R. Co., 3d How., 534.

The law is inexorable. There is no provision for a stay of proceedings by order of a court or of a judge if default be made. There can be no relief unless Congress may be induced to grant it.

It will be observed that the forfeiture arises upon failure to redeem "*in accordance with the provisions of this act*," and it may be important in this connection to consider how and in what manner the act provided for the redemption of the bonds. They were to be redeemed—

First. By the application of one-half the compensation to be paid by the United States to the company for services to be performed for the United States.

Second. After the road is completed, by the annual payment "of at least five per centum of the net earnings of the road."

Third. By the payment of said bonds at maturity.

These are the money payments or their equivalent; but there are still more important conditions of a pecuniary nature for the benefit of the Government, and which are of the very essence and marrow of the act. They are "that the company shall keep the railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores, upon said railroad for the Government whenever required so to do by any department thereof, and that the Government shall have the *preference* in the use of the same for the purposes aforesaid at fair and reasonable rates of compensation," &c. (See sec. 6, act 1862.) And that these rates should be fair and reasonable, Congress further provided and reserved to itself

the right, upon certain conditions, to reduce the rates in amount, and establish the same by law. (Sec. 18, act 1862.)

These are the more prominent provisions of the acts affecting the continuing right and pecuniary interests of the Government in the road and in the control of the same. It is true that the act of 1864, makes the lien of the Government subordinate to a mortgage, but it will be observed that this waiver is partial only. The right to the *preference in use*, the applying of the half of the compensation to the payment of the bonds, the right to the five per centum of the net earnings, the right to regulate and fix the rates, and the right to take possession of the road if permitted to be out of repair and unfit for use, are in no respect waived. The priority of the Government in all, each and every of those essential particulars is studiously preserved.

By these roads, constructed in whole and in part, the mails for nine-tenths of all the people west of the Missouri river and north of the Indian country are carried, and for and in the same proportion of territory and population the troops, supplies, and munitions of war of the Government are transported. The roads and equipments are in the control of the several companies for the secondary use of the public, and in that respect to subserve another duty, the transporting of merchandise and persons between distant States—commerce—authorized by the Federal Constitution to be regulated by Congress; and yet for this, as well as for the carriage for the Government, Congress retained a supervising power to fix the rates of compensation.

But it is said that because Congress, in devising the means by which it should execute the powers conferred by the Constitution, has availed of corporations created in part by Congress for the purpose, and in part by other authority, and because the normal condition of these corporations was such as would make them liable to taxation—the fact that Congress has created the one and adopted the others to its use, does not affect the right of the State to tax and subvert all this property, and so put an end to the scheme devised by Congress for the use and preservation of the Government. Singularly enough that in the midst of ter-

rific war waged in the cause of State rights, asserted to be superior to the power of the nation, laws should be passed by Congress for the maintainance of its authority, and yet within five years from that time such laws should be, by one of the States assailed, and the very *means* provided by Congress for the assertion and maintainance of its authority, menaced and threatened with destruction. It is all in vain, if the State may say, this is a corporation existing only by authority of the State, and all its property, whether in trust for the United States or otherwise, is subject to be taken for the use of the State.

The answer is plain and conclusive. The Congress of the United States, in the exercise of its constitutional power, has adapted this artificial body to its use, has made it its agent, has clothed it with new and additional powers, to enable it to execute the lawful will of Congress, and the State cannot in any manner retard, impede, burden, or control the operations of this agent, the company, in the discharge of its duties and obligations to the Federal Government. If a question could be made that the corporation had no authority under the charter to enter into the compact with the United States, it would be answered that this Kansas corporation derived all its powers from the Territorial Legislature, and nothing from the State of Kansas. It was created under the authority of Congress, and owes no special duty to the State; and if this is not enough, the resolves of the Legislature, found on pages 38, 39, 40, and 41, in the transcript, made year after year, urging this action on the part of Congress, afford a complete answer to the question and completely estop the State from alleging any want of authority in the company to accept its present position. (People *vs.* Saratoga and Rensselaer R. R. Co., 15 Wend., 130, 131.) It was done, it will be seen, by authority of and at the instance of the State, and it cannot now complain that it occupies a position exempting it from the operation of its tax laws. But we go further, it is not for any State to prescribe or question the means—whether by natural persons or artificial bodies—employed by Congress to carry into effect its powers.

If it was necessary, the wisdom of the laws under consideration could be easily vindicated; but it is enough to say that Congress

intended to and did provide for the execution of certain of its delegated powers. And this has been done in the mode and way which Congress deemed most appropriate; one in which the greatest economy could be practised, and the greatest benefit secured to the public, with the least expenditure of the public money.

And now, because Congress created, and availed itself of corporations already created, to carry out its purposes, and invested the public money with the capital of individuals in the building of the roads, and committed the operation and management of such roads to their experienced care, rather than to military or civil officers of the United States, it is claimed by the State that the relation of debtor and creditor simply exists between these corporations and the United States; that the security for the bonds and lands, and right of way, &c., granted upon condition by the United States, is a Kansas, a Nebraska, a Wyoming, a Utah, a Nevada, a Colorado, a California mortgage; and that all this roadway, with the track and equipments upon it, representing near two hundred millions of dollars, more than half of which in bonds, lands, right of way, &c., and has been advanced by and is the property of the United States—is subject to be seized and sold by the States and Territories through which this vast system of roads is constructed.

The truth is, that the entire property belongs to the United States, and that the corporations in possession are trustees, and will be but tenants at sufferance after condition broken. It is true there is what is termed a first mortgage upon the road, but if default shall be made in the payment of the bonds secured by that mortgage, the purchaser, upon foreclosure and sale of the road, will be under precisely the same obligation to the United States that the company now is, except that the bonds of the United States will not have to be paid by the purchaser at the expiration of thirty years from their date, nor will he be required to set apart the five per cent. of net earnings to the payment of the same, but in that, as in the present state of the case, the right of the United States to the preferred use of the road for the purposes to subserve which it was built, will remain,

and remain forever. No State, by any law, can break or confiscate those rights; Congress alone can release them. Failure to comply with the conditions subjects the property to seizure by the Secretary of the Treasury, and subsequent management by authority of Congress, the same in one case as in the other.

Consider then the effect of these Kansas tax laws upon this property. If sold by virtue of them for non-payment of taxes, the purchaser is to have a deed in fee simple of the premises or parcel of land that he purchased, not a deed that constitutes him a corporation, or that establishes any relation between him and the company, or the United States. The two hundred feet right of way granted by the United States to the company (sec. 2) upon condition (sec. 6) that the company shall (1) pay the bonds, (2) keep the railroad and telegraph line in repair and use, (for the public as well as the Government of course,) (3) transmit despatches, (4) transport mails, (5) transport troops, munitions of war, supplies and public stores upon said road for the Government, which shall at all times have the preference, at fair and reasonable rates, &c., and if default be made in the performance of any of these conditions, the possession of said road (sections 5, 17 and 18) is forfeited to the United States, with power to repeal the grants or hold the property forever, without a word of lawful complaint from anybody. In such case, what will the purchaser at the tax sale have? How is it possible for the State to invest him with a fee simple title? But it may be said that the purchaser buys at his peril, and may take such title as the State may be enabled to give, that the State does not guaranty the title; but if the property is "*subject to the tax*," the purchaser will have the right to subject the property to his use, a use in direct hostility to the use to which it has been devoted by Congress, and will "impede, retard, burden, delay" the company, and probably prevent it from performing its duties and obligations to the Government, and, *eo instanti*, the property is forfeited to the United States by the inexorable law of the contract, against which no court can grant any relief.

This much as to what is called the realty in the tax laws; but what becomes of the personalty—the "moveable property," as

it is called—rolling stock, we suppose? That is to be seized by the sheriff and sold; and being personalty, and necessarily in the possession of the sheriff, it shall come to pass that the locomotive and train transporting the mail, troops, and war material of the United States over this road through Kansas, destined for New Mexico, Colorado, or elsewhere beyond, to protect the inhabitants or suppress an insurrection, shall be seized by the Kansas sheriff for the non-payment of taxes upon this same property put there and kept there by Congress for the often-declared purpose of executing the powers delegated to Congress by the Federal Constitution. It is no answer to say that the company has or ought to have the means to pay the taxes, or that the sheriff will not seize property in use, or required for immediate use of the Government. All of these suggestions were answered by Chief Justice Marshall in the case of McCulloch, (4 Wheat., 316,) and the legality or propriety of his answer has never been questioned. It is a question involving a conflict of right and power, and "*confidence*" has nothing to do with it. If the State can lawfully assess a tax upon the road, it can enforce the payment of the tax by seizure and sale, and dispossession of the company, which is the chosen and authorized agent of Congress, and, in an enlarged sense, the bailee of this property and *franchises*, to hold and control the same upon condition, and until default; which if made by the company, "*the said road* with all the rights, *functions*, *immunities*, and *appurtenances* thereunto belonging, and also all lands granted to said company by the United States" are forfeit, so that the very attempt to enforce the law defeats itself; any interference with the property by the tax-gatherer vests the right of possession in the United States, undeniably clear and exempt of all State authority. A tax cannot be assessed and enforced without an interference with the property, and the slightest interference will obstruct, retard, burden, and prevent the company from the performance of its obligations to the extent of the interference. It will destroy the security provided and set apart by Congress for the payment of the Government bonds, and deprive the Government of the use of the road for all the purposes declared in the acts of Congress,

and of the five per cent. of the net earnings to be annually set apart for the payment of the bonds. In short, all the means contrived and created by Congress with so much care and caution through successive years of legislation, for the construction of a complete and comprehensive system of railroads for the use and benefit of the public and of the Government, in peace and in war, in which the United States has invested millions upon millions of dollars, may be brought to naught by the taxation by the States and Territories through which these roads pass, the will of Congress may be frustrated, and its power set at defiance.

Let it be borne in mind that whatever rule is applied to this company and road, must, of necessity, be applied to the Union Pacific proper, and all the other branches. The 9th section of the act of 1862 settles that question, and sections 10, 12, and 18 of that act, and sections 12, 15, and 16 of the act of July 2, 1864, also the act of July 3, 1866, (14 Stat., pp. 79, 80,) authorizing the company to designate its route, and the act of March 3, 1869, (2d section,) providing for the Denver and Cheyenne connection. (15th Stat., p. 324.) Indeed all through the acts the clearest evidence appears that Congress intended to accomplish all that it professed in the title of the act, and in the 15th section of the act of 1862. If one part of this system of roads can be successfully attacked by State or local authority, any other part may be for the same reason in like manner attacked and destroyed, and it comes to this, that in this system—

> "Whatever link you strike,
> Tenth, or ten thousandth breaks the chain alike."

Counsel for the State seeing that these roads are so blended that all have equal right to such protection as the Federal authorities may afford, tacitly admits (page 19 of his brief) that the right to tax the Kansas Pacific road depends upon the right to tax the Union Pacific. Now if that road, with Government directors to look after the millions of the Government invested in it, may be taxed and sold out by the authority of States, which would not have existed but for the road built by the people's money, we

may expect the common people to be not a little amazed that the thing can done.

It would seem plain enough that if Congress had power to provide for making these roads for its own use, and that it has so made them, there can be no higher evidence that they were made for the use of the Government than the declaration of Congress to that effect.

Indeed, it would be illogical to conclude that they were not made for the use of the Government of the United States; for Congress has no power to apply the public funds to an enterprise not designed for the benefit of the Government. It can only act in the execution of powers that belong to it.

And if these roads have been made under and according to the due exercise of the powers of Congress, and for the use of the United States, as declared by Congress, that is an end of the controversy, for "no man can serve two masters" any more now than in former times.

The allegiance of these companies is due to the United States, and their existence depends upon it, for such is their organization and condition, and the tenure of their corporate property, that the moment they are subjected to the authority of another power, by which they shall be hindered or impeded in performing their duties to the United States, that moment they cease to exist.

It is said by Chief Justice Marshall, in the case of McCulloch, that the real estate of the bank was subject to the tax laws of the State of Maryland; hence it is concluded by counsel for the State of Kansas, in this case, that the road-bed, track, &c., is subject to be taxed within the authority just cited. This error of the counsel has arisen in his failure to remember that the bank could have discharged the duties it owed the Government without any land. It was not necessary to the performance of any of its functions that it should own land; whereas it is necessary that the railroad shall own and control the road-bed, the track, &c.—the very object of assessment, the right of way which was granted upon condition as before mentioned, without which its functions must necessarily cease.

Again, it was supposed that the principle of law which will exempt the Union Pacific railroads from State interference will exempt all the railroads, the construction of which was aided by grants of land, and the case of the grant to Illinois is cited as an example. Here the counsel has failed to note that the grant was to the State, and that the State created a corporation and placed the lands in its control, and that the taxes paid to the State are specific, based upon a compact with the State by the corporation. It is difficult to see any analogy in the cases.

Admitting, however, that in the course of legislation Congress has directly granted lands to corporations to aid in building railroads, upon condition that the company should carry mails, troops, &c., whether such roads will be exempt from taxation or not must depend upon the terms and conditions of the grant, and the intent of Congress will have to be ascertained by an examination of the law in each case when the question shall arise. If it shall appear that the grant is absolute, and the condition is subsequent, that the United States has neither a property interest in the road nor the right to its preferred use, nor the right to regulate its rates of carriage, nor the right to a portion of its earnings, nor the right to take possession of the road upon non-compliance with any condition, that the company derived none of its powers from Congress, (which is the case, it is believed, with every land grant beside that in aid of the Union Pacific and branches,) then no question is made that the State can tax the road.

Though in the cases of McCulloch and Osborne it was held that the bank did not hold all its property exempt from taxation, and the lands of the bank could be taxed, because they were not necessary to the operations of the bank in its relations to the Government, as has been shown, the direct reverse is the case with this road. Without the track and appurtenances its duties to the Government cannot be executed; the rights of the United States in its use and property cannot be enjoyed and insured.

Neither the franchise nor anything necessary to the operation of the road, or which will be forfeit to the United States upon

failure to perform the conditions of the grants by Congress, can be taxed by the State of Kansas.

Whatever tax that or any other State, Territory, or governmental community shall impose upon the Union Pacific railroad or any of its branches, will be like the "*Sound dues*," a tax for *passage*, and not for carriage of the commerce of this and all nations, and upon all the service of the United States to be rendered by the companies. A most unseemly spectacle, that Congress, having provided for the constructing these roads for the especial use of the nation, shall be compelled to pay tribute to the States through which they pass in order to enjoy their use, under a constant menace of their destruction!

J. P. USHER,
Counsel for Complainants.

I have taken the liberty of appending to this argument the following extracts from the notes of Mr. Glover, of St. Louis, Missouri, who participated in the argument before the circuit court, in which the division of the court arose in this case.

J. P. U.

(2.) The laws by which the Union Pacific railway, Eastern Division, has been created, being constitutional and valid, it becomes necessary to consider what these laws propose to do and secure for the purposes of the Government of the United States. The title of the acts is very specific on this question. The object of the laws is "to secure to the Government of the United States the use of the road and telegraph for postal and military and other purposes."

The third section of the act of July 1, 1862, states expressly that the purpose of the act in making the grants of land is (1) to secure the safe and speedy transportation of the mails; (2) the transportation of troops, munitions of war, and public stores.

The fifth section vests the title to "the road and telegraph, rolling stock, fixtures, and property of every kind and description," in the United States, as mortgagees, to hold for repayment of the thirty-year bonds and interest advanced by Government to build the road; and in case any portion of the debt remains unpaid, or in case the company fails to comply with the stipulations touching the payment of the bonds, directs the seizure of the whole for the absolute use and benefit of the United States.

Now, mark, this seizure is not to pay the debt, not to force an account, but to secure the legal and political objects of the Government in creating the work. Just here it is contended that a relation of debtor and creditor only was created, and the corporation is made free of Government use, control, and ownership, by paying the debt. But that was not the sole object of Government. The Government wished to get its money back, to be sure, and with that view determined to appropriate its funds; but for fear it might be contended that the payment of the mortgage would free the road of its power over it, the fifth section was made as it is, and the sixth section was inserted immediately after the mortgage clause, more distinctly showing the object of Congress.

This sixth section provides and declares that the grants mentioned in said act of Congress are made on the condition that (1) said bonds shall be paid at maturity; (2) that the company shall keep the road and telegraph line in repair (3) and in use, (4) and at all times transmit dispatches over said telegraph line (5) and transmit mails, (6) troops, munitions of war, and supplies and public stores, on said railroad for the Government, whenever required to do do so by any department thereof.

These are duties which the corporation are required to perform to the Government, not for a definite period, but forever. They are a part of the constitution and nature of the corporation. They cohere in the law of its being. It was constituted for this purpose. But for the duty to perform these obligations, it never would have been built. And the performance of those duties by the means of this

road and telegraph, or some other suitable means, is essential to the existence of the Government of the United States. And such is the nature of this corporation, under said acts of Congress, that unless it perform these duties it must cease to exist. Shall the means provided by the United States to carry mails or troops and ammunition be made subjects of State taxation? How can it be made to serve the purposes of State taxation, or any other State purposes?

(3.) The Union Pacific railroad, being an instrument created by Congress, and devoted by Congress to carry the national mail and transport national troops, munitions of war, supplies and public stores, and to open a way for commerce, of persons, and merchandise between distant portions of the national territory, it cannot be touched by State legislation. We have seen that Congress had power to create this work, and to secure its use and enjoyment for the national Government forever. But if there be any authority but Congress that can interfere with its existence, then it would seem that Congress never had such power. If Congress has no such power, then it cannot exist, for the Government of the United States no longer exists without such power. If the State of Kansas has power to tax, seize, sell out, cut in two, and destroy this work, it is manifest that Congress had no power to make or secure its use to the nation. Whatever Congress or any one else may lawfully do, no other power can lawfully undo. This is an elementary principle essential to the existence of power.

In McCullough *vs.* Maryland, (4 Wheat., 316,) it is laid down that "the Constitution and laws of the United States made in pursuance thereof, are supreme. They control the constitutions and laws of the several States, and cannot be controlled by them."

The Supreme Court says further, "the power to create is the power to preserve. The power to tax is the power to destroy, and a power to destroy, wielded by a different hand, is incompatible with a power to create and preserve." "The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its own authority, but it does not extend to those means which are employed by Congress to carry into execution powers conferred on that body."

In the case at bar the Union Pacific railway and telegraph line are employed by Congress to execute powers conferred on that body, and consequently it is not subject to State taxation.

This road and telegraph were not constructed by the mere consent or permission of the State of Kansas, but Congress had the constitutional power to construct and employ them without the consent of said State, therefore the State cannot counteract the expressed will of Congress in this behalf.

The Supreme Court of the United States, in the same case, proceeds to say: "If the States may tax one instrument employed by the Government in the execution of its powers, they may tax any and every other instrument. They may tax the mail, the mint, patent rights, the papers of the custom house, and all the means employed by the Government. This was not intended by the American people."

The Court is familiar with the fact that the case of McCullough *vs.* Maryland involved the constitutionality of the Bank of the United States, and that the power to charter the bank was found by the Court in the power expressly granted to lay and collect taxes, borrow money, and regulate commerce; and that the Court decided that the law of Maryland laying tax on the Bank of the United States and its property, was void, on the ground above stated.

The judgment was not satisfactory to all, and the point was again argued and decided in Osborn *vs.* Bank United States, (9 Wheat., 738,) in respect to a similar statute enacted in Ohio. In this case the Court refers to the bank as an institution "*carrying on the fiscal operations of the Government while transacting its own business,*" and the Chief Justice in his opinion remarks: "The question is, whether the Constitution of the United States has provided a tribunal which can peaceably and rightfully protect those employed in carrying into execution the laws of the Union from the attempts of a particular State to resist their execution.

"The bank is not considered a private corporation, whose principal object is individual trade and individual profit, but is a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with Government is admitted. But the bank is not such an individual or company.

"It was not created for its own sake, or for private purposes. The whole opinion of the Court in McCullough *vs.* Maryland is founded on the idea that the bank is an instrument necessary and proper for carrying into effect powers vested in the Government of the United States.

"It is not an instrument which the Government found ready made, and supposed to be adapted to its purposes, but one which was created for national purposes only. It is undoubtedly capable of transacting private as well as public business, while it is a great instrument by which the fiscal operations of the Government are effected, it is also trading with individuals for its own advantage."

The law of Ohio was consequently pronounced unconstitutional and void. Every idea expressed by the Court applies here—the Union Pacific railroad is made to secure the transportation *of* troops and mails. This idea is repeated thirteen times in five acts of Congress.

It has been attempted to distinguish between this case and that of Osborn *vs.* Bank United States. To do this, it is contended that the Union Pacific railway and telegraph, is a corporation of Kansas, not deriving its powers from nor created by Congress. But these propositions cannot be maintained. It is true, the Leavenworth and Pawnee Western railroad was chartered by the Territory of Kansas deriving powers from Congress; but it is also true that the Union Pacific railway, Eastern Division, is essentially enlarged in its franchises and endowed with different and new powers derived from Congress. Observe (1.) By the Kansas charter, the railroad was to run from Leavenworth, in Kansas, but by the acts of Congress from the mouth of Kansas river, and on the south side thereof, in Missouri. (2.) By the Kansas charter the company could locate the road; but by the acts of Congress a new route is designated, and a power of location is vested in the President of the United States. (3.) By the Kansas charter one condition was imposed in reference to construction, viz: that it should commence in five years; but the acts of Congress required one hundred miles to be finished in two years from acceptance thereof. (4.) The Kansas charter allowed twelve years to complete the work; but the acts of Congress demanded one hundred miles per annum to be finished after the first two years. (5.) The charter of Kansas made a corporation subject to its control; the acts of Congress assume to *secure* the absolute use and enjoyment of the railway and telegraph for its use, and subject it to the control of Congress. (6.) The acts of Con-

road and telegraph, or some other suitable means, is essential to the existence of the Government of the United States. And such is the nature of this corporation, under said acts of Congress, that unless it perform these duties it must cease to exist. Shall the means provided by the United States to carry mails or troops and ammunition be made subjects of State taxation? How can it be made to serve the purposes of State taxation, or any other State purposes?

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gress have furnished the means to build the road and telegraph, and taken to the States a mortgage to secure the repayment, in default of which, or in default of its securing to the United States its political objects, the whole property owned by the corporation vests irredeemably in the United States as absolute owners. (7.) The acts of Kansas made a private corporation owing no duty to Government except obedience to its general laws, but the acts of Congress have made it an agent of the United States forever, on such condition that a failure to perform annihilates its being; and this not by a contract between the Kansas corporation and the United States, but by the very laws of its being.

Under this state of the case, if these acts of Congress are constitutional, the corporation must be regarded as deriving its most essential powers from Congress. All this is without any complaint on the part of Kansas. Whatever may be the conflict, if any, between the franchise given by Congress and Kansas, all has been done by assent of Kansas, as we have seen by its repeated resolves. If the State of Kansas could resume her franchises, the franchises granted by Congress would remain; but there is no conflict here until raised by Kansas.

(4.) The Legislation of Kansas, in attempting to tax this road and telegraph, is destructive of the legislation of Congress and of the instruments they have made to execute their powers.

It was not the intention of Congress to bargain with a corporation in Kansas for the use of their road and telegraph. They did not mean to take a lease for years and enforce their rights therein by action—not at all.

On the contrary, it was an ordinary act of legislation to secure a political end of Government. The Congress intended to create an agent and to compel its active employment by means of law and powers reserved in transporting mails, troops, munitions of war, and necessary information.

The tax of the State of Kansas, then, is emphatically a tax on the exercise of the national powers to transport troops and mails in that State. If the tax is collected, it diminishes the means of the company in performing its duty. If the property is sold, so much of the road and telegraph is cut in two and taken away, and the laws of Congress, intended to secure the work to the use of the United States, are annihilated.

If Kansas can do this, she may pass a law directly prohibiting the United States from the use of this work for postal or military purposes, or any purposes.

But this tax is impracticable. If the law of Congress is constitutional, it will appear that the tax is an impossible thing.

Let us examine a little more closely the several provisions of the act of July 1, 1862.

The 5th section of that act says, "on failure or refusal of said company to redeem the bonds, or any part of them, when required by the Secretary of the Treasury, in accordance with the provisions of this act, the road, with all its rights, functions, immunities, and appurtenances, all lands granted and remaining in the ownership of the company may be taken possession of by the Secretary of the Treasury, for the use and benefit of the United States. This means the absolute use and benefit. Why this stringent provision? The thirteen reiterated expressions in these laws show. The purpose of Congress was to secure the use of the road for political ends. It was in time of war. The political considerations surrounding the subject were of the gravest character. They did not mean to contract, but

to lay down law. If you fail to do this your title ceases. We give you land and money to build this road for great political ends. If you fail we shall own the road. We declare that, as lawgivers, the moment you fail to observe the intention for which we made the work it passes to us. Examine section 5; there the condition is laid down, and there the legal consequences are declared.

But there are other conditions more fully and stringently elaborated. Read the 6th section. The condition on which the laws of 1862 were passed is (1) the bonds shall be paid at maturity, if not paid before, as in 5th section.

(2.) The company shall keep the road in repair.

(3.) The company shall keep the road in use.

(4.) Shall transport troops, &c.

(5.) Shall transport the mails whenever required.

(6.) Shall give preference to the Government in carrying freights for reasonable rates of compensation, to be applied to the payment of the bonds and interest.

But what is to be the consequence if these conditions in the 6th section are not obeyed? I hold them to be the same as in section 5.

The purpose of the United States was that they should, at all times, have the use of the road.

If the bonds are not redeemed according to the act, that is by carrying the mails, &c., the Government seizes and owns the road. But that consequence is not literally attached to section 6. But the reason of the case would attach it. Why should the Government claim the right to take the road as its own in case the company refuses or fails to transport mails, and not seize it in case it puts it out of repair so it cannot be used? (1 Kent's Com., 462.)

The rule of construction requires all the conditions of the 6th section to be read as if inserted in the 5th, just before the clause of forfeiture.

The legal effect of the two clauses and others in said act of Congress, is that the ownership of the property is in the company during good behavior, and as long as it serves the United States as provided. Upon failure to perform the conditions, the enjoyment of the property and the franchises cease, and vest in the United States.

And this being the condition of the grant or the mandatory provision of the law, and there being no provision for restoring the property or taking any account between the parties, the title must needs be absolute, for no court of equity can relieve.

Such being the condition of the company's title, it is manifest a sale for taxes is impracticable.

The sale of the road for taxes would be putting so much of the road as was sold, out of the use of the company, and would immediately make it the right and duty of the United States to take the road away from the purchaser.

An assessment for taxes proceeds on the idea that the thing assessed may be sold, and transferred to the purchaser, but in this case, the sale for taxes is an act which *per se* defeats the title.

The operation of the law may be aptly stated thus—the act of Congress grants the franchises and property to the corporation so long as it is not sold for taxes—then to vest in the United States.

The nature of the interest of the United States is further shown by the seventeenth section. That section provides if (1) the company fails to finish the road and telegraph in a reasonable time, or

(2.) To keep the same in repair, or

(3.) To keep the same in use, or

(4.) Allow the same to be out of repair, or (5) allow it to be unfit

for use. Congress may pass an act to insure the completion of the same or put the same in repair or use, and may direct the whole income to be employed for that purpose to defray the expenditures thereof.

Now the meaning of this is, that if by sale for taxes or otherwise, the company is put out of the use of the road, if Congress does not see fit absolutely to oust the company of all right under the fifth and sixth sections, Congress may take the road away temporarily, to put it in repair or in use, or to finish it, and may repeat this as often as its own enjoyment of the work for transporting troops and mails is interfered with.

And the effect is, that by the law of the being of this corporation, Congress may give to a sale for taxes just so much respect as they please and no more, or none.

But the other side will perhaps insist that in case of a sale for taxes, the purchaser might go along under this seventeenth section at least, and run the road for the use of the United States and himself.

This is a mistake. The assessment is made under the 20th section of the revenue act of Kansas, p. 262.

The law authorizes an assessment on the roadbed, track, water and wood stations, and other realty necessary to the daily running operations of the road. The corporate franchise is not assessed. The sale of the roadbed, track, &c., would pass no franchise, the purchaser could not operate the road bought, he could only take away the material or abandon it—that would be his position. The corporation would own a franchise, but no roadbed or track, neither could run the road—a hiatus, a gap would exist, and that would defeat the whole purpose of the act, would be in conflict with all the clauses already mentioned, and with the whole tenor of the acts.

We have seen that—

(1.) These acts of Congress were passed to secure the repayment of bonds and the transportation of mails, troops, munitions of war, and public stores, for the Government forever.

(2.) That a failure or refusal by the corporation to redeem the bonds by using the road, in accordance with the provisions of the several acts, is a cause of forfeiture to the United States.

(3.) That non-payment of bonds at maturity is a forfeiture to the United States.

(4.) That failure to keep the road in repair is a forfeiture.

(5.) That failure to keep the road in the use of the company is a forfeiture.

(6.) Failure to transport troops, or mails, or stores, &c., is a forfeiture to the United States.

(7.) That failure to give the Government preference in the use of the road is a cause of forfeiture.

(8.) That Congress may at any time take possession of the road and repair it; or, if gets out of the use of the company, may restore the use, and use all incomes for this purpose, or forfeit all the property absolutely.

(9.) Congress may modify, alter, repeal, &c., at pleasure.

How is it possible that a tax by State authority can be laid on corporate property thus situated and held for the use of the United States?

The fifteenth and sixteenth sections of the charter of the Bank of the United States did not make the bank so much an instrument of the Government as this.

Now let us inquire whether it was possible for Congress, if it had

been its sole design to create a public agent, for the carrying on of its military and postal operations, and for the encouragement, regulation, and protection of commerce between all the parts of the country traversed by the Union Pacific railroad and its branches, to have made stronger provisions, or used more apt words, less likely to be misunderstood, than are made and used in the acts now under review. And is it now possible to doubt that those acts were made for the purposes declared in their title and throughout the body of them?

Supreme Court,

OF THE UNITED STATES.

December Term, 1869.

J. EDGAR THOMPSON ET AL.

vs.

THE UNION PACIFIC RAILWAY COMPANY,

E. D., ET AL.

ARGUMENT.

JAMES H. STORRS,

Of Counsel, for

THE CENTRAL PACIFIC R. R. CO. OF CALIFORNIA, and the WESTERN PACIFIC R. R. CO.

New York:

EVENING POST STEAM PRESSES, 41 NASSAU STREET, COR. LIBERTY.

1870.

Supreme Court of the United States,

DECEMBER TERM, 1869.

J. EDGAR THOMPSON, *et al.*,

vs.

THE UNION PACIFIC RAILWAY CO., E. D., *et al.*

The following argument is submitted by permission of the Court, on behalf of the *Central Pacific Railroad Company of California*, and the *Western Pacific Railroad Company*. These companies have the same interest in the question before the Court as the parties to this suit.

The Central Pacific Railroad Company of California was originally organized on the 28th day of June, 1861, by filing articles of association under the General Railroad Laws of the State of California. It was incorporated to run from the City of Sacramento to the eastern boundary of the State of California.

The Western Pacific Railroad Company was organized originally under the General Railroad Laws of California, but by assignment from the Central Pacific Railroad Company, and under the Act of Congress of March 3d, 1865, hereinafter recited, it became possessed of the right to construct that part of the Pacific Railroad and Telegraph line between the City of San Jose and the City of Sacramento in the State of California.

By Section 9 of the Act of Congress, entitled: "An Act to aid in the construction of a Railroad and Telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military, and other purposes, approved July 1, 1862"

* * * * * * *

"The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this Act for the construction of said railroad and telegraph line first mentioned (Union Pacific), and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California."

* * * * * * *

And by section 10 of the same Act:

* * * * * * *

"The Central Pacific Railroad Company of California, after completing its road across said State, is authorized to continue the construction of said railroad and telegraph through the territories of the United States to the Missouri River, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this Act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed."

It will be seen from the above quotations that the Central Pacific Railroad Company are authorized to build their road on the same terms and conditions in all respects, as provided in the act in relation to the Union Pacific Railroad Company, that is, they are vested by the act with all the powers and privileges conferred upon the Union Pacific Railroad Company, and in case of failure to perform the obligations assumed, they are subject to the same penalties imposed upon the Union Pacific Railroad Company.

Let us now see what these powers, privileges and obligations were, and what the penalties for failure. In order to do this, extracts from the various sections of the Acts bearing upon the questions before the Court are collated.

SEC. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby granted to said company for the construction of

said railroad and telegraph line; and the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad, where it may pass over the public lands, including all necessary grounds for stations, buildings, work-shops and depots, machine shops, switches, side tracks, turn-tables and water stations. The United States shall extinguish as rapidly as may be, the Indian titles to all lands falling under the operation of this Act, and required for the said right of way and grants hereinafter made.

SEC. 3. *And be it further enacted,* That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of *five* (changed to *ten* by sec. 4, 1864,) alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of *ten* (changed to *twenty* by sec. 4, 1864,) miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided,* That all *mineral lands* shall be excepted from the operation of this Act; but where the same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

SEC. 5. *And be it further enacted,* That for the purposes herein mentioned, the Secretary of the Treasury shall, upon the certificate in writing of said Commissioners of the completion and equipment of forty (now twenty, by Act of 1864,) consecutive miles of said railroad and telegraph, in accordance with the provisions of this Act, issue to said company bonds of the United States of one thousand dollars each, payable in thirty years after date, bearing six per centum per annum interest, (said interest payable semi-annually,) which interest may be paid in United States Treasury notes, or any other money or currency which the United States have or shall declare lawful money and a legal tender, to the amount of sixteen of said bonds per mile for such section of forty (now twenty) miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, *the issue of said bonds and delivery to the company shall ipso facto constitute a first mortgage on the whole line of the said railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of the said company to redeem said bonds or any part of them, when required so to do by the Secretary of the Treasury, in accordance with the provisions of this Act, the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in*

the ownership of the said company, may be taken possession of by the Secretary of the Treasury for the use and benefit of the United States.

SEC. 6. And be it further enacted, *That the grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops, and munitions of war, supplies and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid,* at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service; and all compensation for services rendered *for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid.* Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidence of debt against the United States, to be allowed at par, and after said road is completed, *until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof.*

SEC 11. *And be it further enacted,* That for three hundred miles of said road, most mountainous and difficult of construction, to wit: one hundred and fifty miles westwardly from the eastern base of the Rocky Mountains, and one hundred and fifty miles eastwardly from the western base of the Sierra Nevada Mountains, said points to be fixed by the President of the United States, the bonds to be issued to aid in the construction thereof shall be *treble* the number per mile hereinbefore provided, and the same shall be issued, and the lands herein granted set apart, upon the construction of every twenty miles thereof, upon the certificate of the Commissioners as aforesaid that twenty consecutive miles of the same are completed; and between the sections last named of one hundred and fifty miles each, the bonds to be issued to aid in the construction thereof shall be *double* the number per mile first mentioned, and the same shall be issued, and the lands herein granted be set apart, upon the construction of every twenty miles thereof, upon the certificate of the Commissioners as aforesaid that twenty consecutive miles of the same are completed.

* * * * * * * * *

SEC. 12. *And be it further enacted,* That whenever the route of said railroad shall cross the boundary of any State or Territory, or said meridian of longitude, the two companies meeting or uniting there shall agree upon its location at that point, with reference to the most direct and practicable through route, and in case of difference between them as to said location, the President of the United States shall determine the said location; the companies named in each State and Territory to locate the road across the same between the points so agreed upon, except as herein provided. The track upon the entire line of railroad and branches shall be of uniform width, to be determined by the President of the United States, so that when completed, cars can be run from the Missouri River to the Pacific coast; the grades and curves shall not exceed the maximum grades and curves of the Baltimore and Ohio Railroad; the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel and transportation, so far as the public and government are concerned, as one connected continuous line. * * * * * *

SEC. 16 *And be it further enacted,* That at any time after the passage of this Act all of the railroad companies named herein, and assenting hereto, or any two or more of them, are authorized to form themselves into one consolidated company, notice of such consolidation, in writing, shall be filed in the Department of the Interior, and such consolidated company shall thereafter proceed to construct said railroad and branches and telegraph line upon the terms and conditions provided in this Act.

SEC. 17. *And be it further enacted,* That in case said company or companies shall fail to comply with the terms and conditions of this Act, by not completing said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished or out of repair and unfit for use, Congress may pass any Act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies.

* * * * * * * * *

SEC. 18. *And be it further enacted,* That whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures—including repairs and the furnishing, running and managing of said road—shall exceed ten per centum upon its cost, (exclusive of the five per centum to be paid to the United States,) Congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this Act—namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, Congress may at any time—having due regard for the rights of said companies named herein—add to, alter, amend, or repeal this Act.

The Act of 1862, was subsequently amended. The following are some of the amendments:

AMENDMENT OF 1864.

An Act to amend an Act entitled "An Act to aid in the construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same, for Postal, Military, and other purposes," approved July 1st, eighteen hundred and sixty-two.

SEC. 5. *And be it further enacted,* That the time for designating the general route of said railroad, and of filing the map of the same, and the time for the completion of that part of the railroads required by the terms of said Act of each

company be, and the same is hereby, extended one year from the time in said Act designated; and the Central Pacific Railroad Company of California shall be required to complete twenty-five miles of their said road in each year thereafter, and the whole to the State line within four years, and that only one-half of the compensation for services rendered for the Government by said companies shall be required to be applied to the payment of the bonds issued by the Government in aid of the construction of said roads.

SEC. 6. *And be it further enacted*, That the proviso to section four of said Act is hereby modified as follows, viz.: And the President of the United States is hereby authorized, at any time after the passage of this Act, to appoint for each and every of said roads three Commissioners, as provided for in the Act to which this is amendatory; and the verified statement of the President of the California Company, required by said section four, shall be filed in the office of the United States Surveyor General for the State of California, instead of being presented to the President of the United States; and the said Surveyor General shall thereupon notify the said Commissioners of the filing of such statement, and the said Commissioners shall thereupon proceed to examine the portion of said railroad and telegraph line so completed, and make their report thereon to the President of the United States, as provided by the Act of which this is amendatory. And such statement may be filed and such railroad and telegraph line be examined and reported on by the said Commissioners, and the requisite amount of bonds may be issued, and the lands appertaining thereto may be set apart, located, entered, and patented, as provided in this Act and the Act to which this is amendatory, upon the construction by said Railroad Company of California, of any portion of not less than twenty consecutive miles of their said railroad and telegraph line, upon the certificate of said Commissioners that such portion is completed as required by the Act of which this is amendatory. And section ten of the Act of which this is amendatory is hereby amended by inserting, after the words "United States" in the last clause, the words "and States intervening."

SEC. 7. *And be it further enacted*, That so much of section seventeen of said Act as provides for a reservation by the government of a portion of the bonds to be issued to aid in the construction of the said railroads is hereby repealed. And the failure of any one company to comply fully with the conditions and requirements of this Act, and the Act to which this is amendatory, shall not work a forfeiture of the rights, privileges, or franchise of any other company or companies, that shall have complied with the same.

SEC. 8. *And be it further enacted*, That for the purpose of facilitating the work on said railroad, and of enabling the said company, as early as practicable, to commence the grading of said railroad in the region of the mountains, between the eastern base of the Rocky Mountains and the western base of the Sierra Nevada Mountains, so that the same may be finally completed within the time required by law, it is hereby provided that whenever the Chief Engineer of the said company and said Commissioners shall certify that a certain portion of the work required to prepare the road for the superstructure on any section of twenty miles is done (which said certificate shall be duly verified), the Secretary of the Treasury is hereby authorized and required, upon the delivery of such certificate, to issue to

said company a proportion of said bonds, not exceeding two-thirds of the amount of bonds authorized to be issued under the provisions of the Act, to aid in the construction of such section of twenty miles, nor in any case exceeding two-thirds of the value of the work done. The remaining one-third to remain until the said section is fully completed and certified by the Commissioners appointed by the President, according to the terms and provisions of the said Act.

* * * * * * *

SEC. 10. *And be it further enacted*, That section five of said Act be so modified and amended that the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of said road may, on the completion of each section of said road, as provided in this Act and the Act to which this Act is an amendment, issue their first mortgage bonds on their respective railroad and telegraph lines to an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest with the bonds authorized to be issued to said railroad companies respectively. And the lien of the United States bonds shall be subordinate to that of the bonds of any or either of said companies hereby authorized to be issued on their respective roads, property and equipments, except as to the provisions of the sixth section of the Act to which this Act is an amendment, relating to the transmission of despatches and the transportation of mails, troops, munitions of war, supplies, and public stores for the Government of the United States. And said section is further amended by striking out the word "forty," and inserting in lieu thereof the words "on each and every section of not less than twenty."

SEC. 11. *And be it further enacted*, That if any of the railroad companies entitled to bonds of the United States or to issue their first mortgage bonds herein provided for, has at the time of the approval of this Act, issued or shall thereafter issue any of its own bonds or securities in such form or manner as in law or equity to entitle the same to priority or preference of payment to the said guaranteed bonds, or said first mortgage bonds, the amount of such corporate bonds outstanding and unsatisfied, or uncancelled, shall be deducted from the amount of such government and first mortgage bonds, which the company may be entitled to receive and issue; and such an amount only of such government bonds and such first mortgage bonds, shall be granted, or permitted, as added to such outstanding, unsatisfied, or uncancelled bonds of the company, shall make up the whole amount per mile to which the company would otherwise have been entitled: *And Provided further*, That before any bonds shall be so given by the United States, the company claiming them shall present to the Secretary of the Treasury an affidavit of the President and Secretary of the company, to be sworn to before the Judge of a Court of Record, setting forth whether said company has issued any such bonds or securities, and, if so, particularly describing the same, and such other evidence as the Secretary may require, so as to enable him to make the deduction herein required; and such affidavit shall then be filed and deposited in the office of the Secretary of the Interior, and any person swearing falsely to any such affidavit, shall be deemed guilty of perjury, and on conviction thereof, shall be punished as aforesaid.

SEC. 15. *And be it further enacted*, That the several companies authorized to construct the aforesaid roads are required to operate and use said roads and telegraph for all purposes of communication, travel and transportation, so far as the public and the government are concerned, *as one continuous line;* and, in such operation and use, to afford and secure to each, equal advantages and facilities as to rates, time, and transportation, without any discrimination of any kind in favor of the road or business of any or either of said companies, or adverse to the road or business of any or either of the others.

* * * * * *

SEC. 16. *It is further provided*, That should the Central Pacific Railroad Company of California complete their line to the eastern line of the State of California, before the line of the Union Pacific Railroad Company shall have been extended westward so as to meet the line of said first-named company, said first-named company may extend their line of road eastward one hundred and fifty miles, on the established route, so as to meet and connect with the line of the Union Pacific Road, complying in all respects with the provisions and restrictions of this Act as to said Union Pacific Road, and upon doing so shall enjoy all the rights, privileges and benefits conferred by this Act on said Union Pacific Railroad Company.

AMENDMENT OF 1865.

An Act to amend an Act entitled "An Act to aid in the construction of a Railroad and Telegraph line from the Missouri River, to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes," approved July first, eighteen hundred and sixty-two, and to amend an Act amendatory thereof, approved July second, eighteen hundred and sixty-four.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section ten of said Act of July second, eighteen hundred and sixty-four, be so modified and amended as to allow the Central Pacific Railroad Company, and the Western Pacific Railroad Company of California, the Union Pacific Railroad Company, the Union Pacific Railroad Company, Eastern Division, and all other companies provided for in the said Act of the second of July, eighteen hundred and sixty-four, to issue their six per centum thirty years' bonds, interest payable in any lawful money of the United States, upon their separate roads. And the said companies are hereby authorized to issue, respectively, their bonds to the extent of one hundred miles in advance of a continuous completed line of construction.

SEC. 2. *And be it further enacted*, That the assignment made by the Central Pacific Railroad Company of California, of the right to construct all that portion of said railroad and telegraph from the City of San Jose to the City of Sacramento is hereby ratified and confirmed to the said Western Pacific Railroad Company, with all the privileges and benefits of the several Acts of Congress relating thereto,

and subject to all the conditions thereof; *Provided*, That the time within which the said Western Pacific Railroad Company shall be required to construct the first twenty miles of their said road, shall be one year from the first day of July, eighteen hundred and sixty-five, and that the entire road shall be completed from San Jose to Sacramento, connecting at the latter point with the said Central Pacific Railroad, within four years thereafter.

Approved, March 3, 1865.

AMENDMENT OF 1866.

An Act to amend an Act entitled "An Act to amend an Act entitled An 'Act to aid in the construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military and other purposes,' approved July first, eighteen hundred and sixty-two, approved July second, eighteen hundred and sixty-four."

* * * * * * *

SEC. 2. *And be it further enacted*, That the Union Pacific Railroad Company, with the consent and approval of the Secretary of the Interior, are hereby authorized to locate, construct, and continue their road from Omaha, in Nebraska Territory, westward, according to the best and most practicable route and without reference to the initial point on the one hundredth meridian of west longitude, as now provided by law, in a continuous completed line, until they shall meet and connect with the Central Pacific Railroad Company of California; and the Central Pacific Railroad Company of California, with the consent and approval of the Secretary of the Interior, are hereby authorized to locate, construct, and continue their road eastward, in a continuous completed line, until they shall meet and connect with the Union Pacific Railroad: *Provided*, That each of the above-named companies shall have the right, when the nature of the work to be done by reason of deep cuts and tunnels shall for the expeditious construction of the Pacific Railroad require it, to work for an extent of not to exceed three hundred miles in advance of their continuous completed lines.

Approved, July 3, 1866.

1. In order to show that the Central Pacific and Western Pacific Railroad Companies have an interest in the question before the Court, it may not be improper to state here that the amount of taxes paid by the Western Pacific Co., to cities and counties in California during the past year was $13,788 54
by the Central Pacific in California 38,827 12
and in Nevada 120,749 80

making a total of 173,365 46
in gold coin, as will be seen by a statement of the Secretary annexed to these points.

II. It may be contended that the Central Pacific and Western Pacific Railroads are state corporations, organized under the laws of the State of California, and hence cannot be relieved from taxation under state authority. Originally they were state corporations, but their character was wholly changed by Congress in empowering them to build portions of the Pacific railroads; from being small local organizations their powers were extended, and they were authorized to take part in this great national work. The Western Pacific Railroad extends from Oakland, opposite San Francisco, to Sacramento, and the Central Pacific extends from Sacramento across the States of California and Nevada, and through a portion of the Territory of Utah, to the city of Ogden, where it joins the Union Pacific Railroad, a total distance of nearly nine hundred miles.

The Territory of Utah cannot raise this question, for Utah was, when the act of Congress was passed, and still is, one of the territories of the United States, and is under the complete jurisdiction and control of the Federal Government.

The State of Nevada cannot make the objection, for Nevada was also a territory of the United States when the Act of July 1st, 1862, was passed, and yet she has taxed the Central Pacific Railroad, in five counties, during the past year, over one hundred and twenty thousand dollars.

To neither Nevada nor Utah is the Central Pacific Company indebted even for its original organization.

And besides, Nevada, after it became a State, by an Act of its Legislature approved March 9th, 1866,

"*To enable the said company or companies more fully and completely to comply with and perform the provisions and conditions of the said Act of Congress,*" &c., &c. * * * * "*hereby confirming to, and vesting in, said company or companies all the rights, privileges, franchises, power and authority conferred upon, granted to, and vested in said company or companies by said Act of Congress.*" Laws of Nevada, 1866, chap. CXII.

But can California claim that these companies are not exempt from State taxation, because they were originally organized under State law, and because she owned the soil upon which the road was built? She cannot, for the reason that the State has surrendered any rights which she originally had to control these companies, and consented to their adoption by the Federal Government.

By an Act of her State Legislature, entitled "*An Act to aid in carrying out the provisions of the Pacific Railroad and Telegraph Act of Congress, and other matters relating thereto,*" approved April 4, 1864, after reciting the Pacific Railroad Act with reference to the Central Pacific Railroad Company, proceeds as follows:

"*Therefore to enable the said company more fully and completely to comply with and perform the provisions and conditions of said Act of Congress,*" &c., &c., * * "*hereby confirming to, and vesting in, said company all the rights, privileges, franchises, power and authority, conferred upon, granted to, or vested in said company by said Act of Congress; hereby repealing all laws and parts of laws, inconsistent or in conflict with the provisions of this act, or the rights and privileges herein granted.*"—Statutes of California, 1863–4, page 437, paragraph 4,798 of General Laws of California.

But more than this, ten years before the passage of the Pacific Railroad Act of Congress of 1862, the State of California, by her State Legislature, passed the following Act:

"*AN ACT to grant the right of way to the United States for railroad purposes.*" *Approved May* 1, 1852; 150.

Whereas, the interests of this State, as well as those of the whole Union, require the immediate action of the Government of the United States *for the construction of a national thoroughfare* connecting the navigable waters of the Atlantic and Pacific Oceans, for the purposes of national safety in the event of war, and to promote the highest commercial interests of the Republic; therefore,

The people of the State of California represented in Senate and Assembly, do enact as follows:

SECTION 1. The right of way through this State is hereby granted to the United States for the purpose of constructing a Railroad from the Atlantic to the Pacific Oceans. [Ocean.]

This is not a grant to the Central Pacific and Western Pacific Railroad companies for the benefit of these companies, but a grant to the *United States*, and the preamble to the Act shows that the State of California intended to cede the right of way through the State to the United States, for a *national thoroughfare* between the Atlantic and Pacific Oceans, for the purposes of national safety, in the event of war, for the interests of their own State, and to promote the highest commercial interests of the Republic.

This was a cession for the good of the whole country of all control over such a thoroughfare in case Congress should ever authorize its construction.

Congress has authorized its construction, and the State of California has, by the Acts of its State Legislature above cited, not only ceded the land necessary for the road to the United States, but has actually confirmed all the *rights, privileges, franchises, powers,* and *authority* conferred upon the company by the Act of Congress, and it will be observed by the Court that by the Act of 1863, as if the confirmation might not be deemed a sufficient waiver of all claims upon the company, the State voluntarily *repeals all laws and parts of laws inconsistent or in conflict with the provisions of that Act, or the rights and privileges thereby granted.*

We submit, therefore, that the State of California, by these Acts yielded up to the United States, all jurisdiction over the companies building the Pacific Railroad, with certain reservations mentioned in the Act, but no right to tax the company is reserved; indeed, the Act of the State of California in regard to the assessment and taxation of railroads and other roads for revenue purposes, was not passed until the following year, 1864, (see general laws of California, paragraph 6451), and consequently cannot apply to these companies.

The taxation of these companies by the State of California is under this last mentioned Act, which we have shown, as we think conclusively, has no application to the Pacific Railroads, and such taxation is therefore without authority of law. If it should be considered that this Act does apply to those companies, by an examination of the Act, it will be seen that the *road and the real and personal property* appertaining thereto, is to be assessed in the several counties, in which the several portions thereof shall be situated, and that the capital stock of such companies shall not be liable or subject to assessment or taxation against said company or corporation.

It has been held that an exemption of the capital stock of a company from taxation, exempts so much of the *property* of the company *as is necessary to carry on its business.*

2, Redfield on Railways, 391.
The Rome Railway, *vs.* Rome, 14 Georgia, R., 275.

For the reason given by the Court in that case, the pro-

perty of the company necessary to carry on its business is a part of the capital stock.

Hence California could not tax the stock of this company, because it was expressly exempt by law.

Nor their property real or personal, necessary for the conduct of their business, because it is included in the stock, and therefore exempt.

But aside from this view of the case, it is only necessary for us to show that state taxation of these companies is, in the lang uage of the California Act of 1863, "inconsistentor in conflict" with the rights yielded up by that Act.

III. There is great danger, if state taxation of these railroads is permitted to continue, that it will be carried to such an extent as to deprive the companies of the power to meet their obligations to the government.

In the payment of the bonds of the United States at maturity and interest.

In keeping the road in repair and use, and

In transporting the mails, troops, munitions of war, and supplies, as required by the government.

Failure in any of these cases, would be a cause of forfeiture.

If the resources of the roads are constantly subject to depletion by state taxation, and the taxes increase from year to year as they are likely to do, they may become so heavy as entirely to exhaust all net earnings of the companies, in which case the government would fail to receive the five per cent. provided to be paid on completion of the roads, and also fail to accomplish the objects and to reap the benefits contemplated by Congress in establishing and aiding in the construction of these roads.

In the case of Paine et al., against Wright and the Indianapolis and Bellefontaine R. R. Co., 5 McLean U. S. C. C. Reps., 395, the learned Judge, in his opinion, uses the following language:

"Railroads have contributed more to the facilities of intercourse, the interest of agriculture, to build up towns and extend our internal commerce, than all other improvements. But in the construction of these works heavy expenditures have been

incurred, and large debts contracted by way of loans of money and otherwise, so that the companies are ill able to bear the pressure of heavy taxation.

"The expense of running the cars, making repairs, and meeting contingencies, is very great; and when to this shall be added the interest on debts incurred, little or no profit can be realized to the stockholders for some years after the road is in operation." * * *

"Now, nothing can be more unequal than the above taxation of railroads. The cost of the work affords no criterion in regard to the profits. This depends upon location and other circumstances which have no connection with the cost of construction; and yet all of them afford more or less public accommodation."

"These great improvements are made, generally, with the means afforded by capitalists of other states or countries, and we are enriched by the expenditure."

"From indications not to be mistaken, these great lines are in danger of being embarrassed, if not destroyed, by taxation."

IV. The proposition that Congress has the constitutional power to create or adopt any means, instruments or agencies necessary to carry on the operations of the Federal Government, will hardly be questioned at this day.

Mr. Justice Story, in his Commentaries on the Constitution, § 1273, says: "The only limitation upon the power" (to make roads, canals and carry out a system of internal improvements,) "are those prescribed by the terms of the Constitution, that the objects shall be for the common defence, or the general welfare of the nation."

And he further says: "It is for instance admitted that Congress cannot authorize the making of a canal, except for some purpose of commerce between the states, or for some other purpose belonging to the Union, and it cannot make a military road unless it be necessary and proper for purposes of war."

Now this railroad was established both for purposes of commerce between the states and for the benefit of the Union, in

time of peace and in time of war, to carry mails, munitions of war and public stores. When these Acts were passed, the whole United States was shaken to its very centre by civil war, and the sound of the enemy's guns might be heard by members of Congress while in their seats in the National Capital, engaged in the discussion of the provisions of these very Acts.

President Monroe, in his message in the year 1822, says: "Good roads and canals will promote many very important national purposes. They will facilitate the operations of war; the movements of troops; the transportation of canon, of provisions, and every warlike store, much to our advantage and the disadvantage of the enemy in time of war. Good roads will facilitate the transportation of the mail, and thereby promote the purposes of commerce, and political intelligence among the people. They will, by being properly directed to these objects, *enhance the value of our vacant lands, a treasure of vast resource to the nation.*"

If such language as this is applicable to the canal and wagon road, how much more to a great railroad and telegraph line, stretching two thousand miles across the Continent, from the Missouri River to the Pacific Ocean, by which instantaneous communication may be had with military officers on the Pacific coast, and within one week's time the entire force under their command, with an army of volunteers, may be in Washington City, should occasion ever again require it. Then, the rapidity with which vacant government lands are taken up and increased in value, is another evidence that the provisions of the Acts above quoted, were not mere idle words, but that they contained an import and meaning which we have hardly begun to appreciate.

We do not believe a doubt can be entertained of the intention of Congress, or of its power to make these companies a great national institution.

The Central Pacific and Western Pacific Railroad Companies are as completely federal institutions, subject to the control and entitled to the protection of the Federal Government by virtue of their adoption as agents and instruments of the Government, as they would have been, had they been originally created by Act of Congress.

It is well settled that, "no precise form of words is necessary in the creation of a corporation * * * where rights, priviliges and powers are granted to an association of persons by a collective name, and there is no mode by which such rights can be enjoyed or powers exercised, without acting in a corporate capacity—this association is made a corporation by implication so far as to enable it to exercise the rights and powers granted."

Angell and Ames, on corp'ns. sec. 76, 78.
1 Redfield on Railways, 57.
Mahoney *vs.* the Bank of the State of Arkansas, 4 Arkansas, 620.

Congress has power to adopt a corporation in existence as well as to create one for its purposes, and when adopted, it is as much a child of the Government, entitled to its protection, and subject to its control, as if it had been in its inception a government institution.

In the case of the Ohio and Mississippi Railroad Company, *vs.* Wheeler, 1 Black, 286, that company was originally incorporated by the State of Indiana, to construct a road within that State : by an Act of the Legislature of Ohio, passed March 15, 1849, the company was recognized as a corporation created by Indiana, and by an Act of the Legislature of Ohio, passed May 24, 1851, the corporation was authorized to extend its road to Cincinnati. As this Court held, on a plea to the jurisdiction, that the company consisted of two separate and distinct corporate bodies, one in Ohio, and the other in Indiana, they must have come to the conclusion, that the adoption of the company by Ohio was equivalent to the creation of the corporation in that State. If this could be done by the Legislature of a State, Congress certainly has the power to adopt these companies as agencies and instruments of the government, and give them powers as such.

VI. It is equally clear that Congress did adopt these companies for the purposes of the general government.

A careful examination of the foregoing extracts from the Acts

of Congress bearing on this subject, would seem to supersede the necessity of any extended argument on this question. One thing these extracts most clearly show, that is: that it was the intention of Congress in passing these Acts to create corporations, or at least to make such corporations as then had an existence, completely the creatures of the government, to perform service for the government, and to aid them in building a great national railroad and telegraph line from the Missouri River to the Pacific Ocean, not as an investment merely, or for the purpose of obtaining six per cent. interest on the bonds of the government, but, as is so frequently declared in the several Acts, "*to secure to the Government the use of the said railroad and telegraph line for postal, military and other purposes.*" Or, as if that language did not state their intention with sufficient distinctness, in those other words also used, "*to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores thereon.*"

VII. Congress not only intended that this railroad and telegraph line should be constructed as a government work, but they as clearly intended that it should continue a government railroad and telegraph line, not for thirty years only, until the bonds given in aid of its construction, with the interest thereon, should be paid, but *for all time*, and they so hedged about the grants to the several companies constructing it, with conditions and provisions, that there never should be the slightest chance left for an implication that it was other than a United States Government railroad and telegraph line.

The various roads composing the great Pacific Railroad were required to be of the same guage, and the main line and each of the branches, whether built by one company or by the several companies named in the Acts of Congress, were required to be run and operated, so far as the public and the government were concerned, as one continuous line from the Missouri River to the Pacific Ocean.

VIII. If, therefore, these companies, in constructing the Pacific Railroad, did not act as state organizations, but under

the Acts of Congress, and are still operating those roads under said Acts, they must be deemed to be federal institutions, and the agents and instruments of the government for the performance of the obligations, duties, and services imposed upon them by the Acts of Congress, and they are consequently free from all control or taxation by state authority, under the leading decisions of this Court.

In the case of McCullough *vs.* The State of Maryland, his Honor, Chief Justice Marshall, says :

"This great principle is that the constitution and the laws made in pursuance thereof are supreme ; that they control the laws of the respective states, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corrollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend.

"These are, 1st. That a power to create implies a power to preserve.

"2d. That a power to destroy, if wielded by a different hand, is hostile to, and incompatible with, these powers to create and to preserve.

"3d. That where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme." * *

"We find on just theory a total failure of the original right to tax *the means employed by the government of the Union for the execution of its plans.* This right never existed, and the question whether it has been surrendered cannot arise."

"If the states may tax an instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom house; they may tax judicial process; they may tax all the means employed by the government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the states." * * *

"The result is a conviction that the states have no power by taxation or otherwise to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared."

In the case of Weston *vs.* the City of Charleston, 2 Peters, 449, Chief Justice Marshall, in delivering the opinion of the Court, says:

"If the States and Corporations throughout the Union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?" * * Speaking of the case of McCullough *vs.* the State of Maryland, and the conclusion the Court arrived at in that case, the Chief Justice continues: "but that conclusion was, that all subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are upon soundest principles exempt from taxation. The sovereignty of a State extends to every thing which exists by its own authority, or is introduced by its permission, *but not to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States.* The attempt to use the power of taxation on the means employed by the Government of the Union in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of single states cannot give.

"The Court said in that case, that 'the States have no power by taxation or otherwise to *retard, impede, burthen or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government.*' We retain the opinion which was then expressed. * * * It ought, therefore, on the principles settled in McCullough *vs.* the State of Maryland, to be exempt from State taxation, and consequently *from being taxed by corporations deriving their power from States.*" * * *

That is exactly our case, here there is a Direct tax upon the means or instrument employed by the Government of the United States, in the execution of its powers, to wit : upon the property employed in conveying the mails, troops, munitions of war, public stores and supplies. We have seen above that this was the specific object of the creation of, and the aid given to the Pacific Railroads.

In the case of the Bank of Cmmerce *v.* New York city, 2 Black, 620.

His Honor, Mr. Justice Nelson, in commenting on the case of Weston *v.* The City of Charleston, in connection with the cases of McCullough *v.* The State of Maryland, and Osborne *v.* The Bank of the United States, says :

"The doctrine maintained in those cases is, that the powers granted by the people of the States to the General Government, and embodied in the Constitution, are supreme within their scope and operation, and that this government may exercise these powers in its appropriate departments free and unobstructed by any State legislation or authority. That within this limit, this government is sovereign, and independent, and any interference by the State governments tending to the interruption of the full legitimate exercise of the powers thus granted, is in conflict with that clause of the Constitution which makes the Constitution, and the Laws of the United States passed in pursuance thereof, the supreme law of the land."

"The result of this doctrine is that the exercise of any authority by a State Government trenching upon any of the powers granted to the General Government, is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligations; and more than this, if the encroachment to any extent is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, even to the destruction of the power. For, as truly said by the Chief Justice in the case of Weston *vs.* The City of Charleston, in respect to the taxing power of the State, if the right to impose the tax exists, it is a right which in its nature acknowledges no limit, it may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe."

* * * * * * *

"The conclusive answer to the attempted exercise of State authority in all these cases is, that the exercise is in *derogation of the powers granted to the General Government*, within which, it is admitted, it is supreme.

"That government, whose powers—executive, legislative, or judicial—whether it is a government of enumerated powers, like this one, or not, are subject to the control of another distinct government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth, that argument would be superfluous. Its functions and means, essential to the admistration of the government, and the employment of them, are liable to constant interruption, and possible annihilation."

It was decided in the Bank Tax case, 2 Wallace, 200, that a tax laid by a State on Banks "on a valuation equal to the amount of their stock paid in or secured to be paid in," is a tax on the *property* of the institution; and when that property consists of stocks of the Federal government, the law laying the tax is void.

In this case his honor Mr. Justice Nelson, in delivering the opinion of the Court says, "When capital of the Banks is invested in stocks, and among others in United States stocks," * * "and this capital thus invested is made the basis of taxation of the institutions, there is great difficulty in saying that it is not the stock thus constituting the corpus or body of the capital that is taxed. It is not easy to separate the property in which the capital is invested from the capital itself. It requires some refinement to separate the two thus intimately blended together. The capital is not an ideal, fictitious, arbitrary sum of money set down in the articles of association, but in the theory and practical operation of the system, is composed of substantial property, and which gives value and solidity to the stock of the institution."

In the case of Van Allen *vs.* the Assessors, 3 Wallace, 585, His Honor, Mr. Justice Nelson, in delivering the opinion of the Court, says, "the power of taxation under the constitution as a general rule, and as has been repeatedly recognized in adjudged cases in this Court, is a concurrent power. The qualifications of the rule are the exclusion of the states from the

taxation of the means and instruments employed in the exercise of the functions of the Federal Government."

In the same case his Honor the Chief Justice, in delivering an opinion on his own behalf and on behalf of Justices Wayne and Swayne, uses the following strong and pertinent language:

"That Congress may constitutionally *organize or constitute agencies* for carrying into effect the national powers granted by the constitution, that these agencies may be organized by the voluntary association of individuals sanctioned by Congress, that Congress may give to such agencies so organized corporate unity, permanence, and efficiency, and that such agencies in their being, capital, franchises and operations are not subject to the taxing power of the States, have ever been regarded since those decisions, (referring to McCullough *v.* the State of Maryland, decided in 1819, and Osborne *v.* The Bank of the United States, decided in 1824,) as settled doctrines of this Court. * * *

"We assume then that National Banking Associations, as such, and in their powers, functions, and operations, are not subject to taxation by the States, on the ground that State laws imposing such taxation are repugnant to the law of Congress, by which they are established and sanctioned."

Now if language, such as is used in these cases is applicable to associations formed for the purpose of Banking, under the federal jurisdiction, will it not more forcibly apply to these Pacific Railroads, which are agencies organized or constituted by the Government of the United States for the expressed purpose "to promote the public interest and welfare, by the construction of said Railroad and Telegraph line, and keeping the same in order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same, for postal, military and other purposes." We say that Congress organized and constituted these roads as agencies for those purposes; that these agencies, in order to accomplish the purposes of their creation, must be free from all control, burthen or authority on the part of the States through which they pass.

To enable the various companies constructing the Pacific Railroad and its branches to complete and equip the same,

the United States, (besides their grants of land,) have loaned them large sums of money in the shape of government bonds, amounting to more than sixty millions of dollars, for which the government of the United States holds, by the law, a first lien (excepting the lien of the Companies' first mortgage bonds, to an amount equal to the government bonds), upon the whole road, rolling stock and property necessary for its operation.

The interests of the government cannot be protected without retaining entire control, and having the property exempt from all state taxation or interference.

These questions arise here for the first time; for this is the first time in the history of this country that we have had a *government railroad*. We have government stocks, government bonds, government banks, post offices and custom houses, but now we have government railroads, which are as completely the means and instruments of the Federal Government, employed for the execution of its constitutional powers, as those other agencies.

If this Court guards, with such scrupulous care, against any taxation of the *Stock* of the United States, which is only an evidence of government indebtedness, why should it not as scrupulously guard the government *property*, *means* and *agencies*?

IX. It may be said that the exemption of this property from taxation would operate onerously, and that other property would be obliged to sustain the burthen of the expenses of states and counties which is now borne in part by these companies. It is immaterial if this were so, but it is not so as matter of fact; there is no property along the line of the road which has not been increased in value ten-fold, and in many cases a hundred-fold by the introduction of these Pacific Railroads. This increase in value will continue with each advancing year; indeed, some of the cities, and we might almost say, counties and states, have been *created, actually brought into existence*, by the construction of these roads under the Acts of Congress.

X. We submit, therefore, that these corporations stand in the same relation to the government that they would have done if originally chartered by Congress.

That they are means and instruments lawfully constituted and authorized to perform an important part in the operations of the Federal Government.

That as such means and instruments they are not subject to state taxation.

And that such taxation is inconsistent and in conflict with the provisions and purposes of the Acts of Congress, under which these companies exist and carry on their operations.

JAS. H. STORRS,
Of Counsel for Central Pacific R. R. Co. of Cal., and Western Pacific R. R. Co.

OFFICE OF THE CENTRAL PACIFIC RAILROAD CO. OF CALIFORNIA,
Sacramento, February 10th, 1870.

STATEMENT of the City and County Taxes Paid by the Central Pacific Railroad Company of California to Cities and Counties of the State of California, for the year 1869:

To Sacramento City		$2,954 79
" Sacramento County		6,768 17
" Placer	"	21,616 26
" Nevada	"	5,785 10
" Eldorado	"	1,702 80
Total,		$38,827 12

E. H. MILLER, JR.,
Secretary.

STATE OF CALIFORNIA,
County of Sacramento.

E. H. MILLER, Jr., being duly sworn, says, that he is the Secretary of the Central Pacific Railroad Company of California, that the foregoing statement of the City and County taxes paid by said Company to Cities and Counties in the State of California for the year 1869 is true, and that the same were paid in gold coin.

E. H. MILLER, JR.

Subscribed and sworn to before me this tenth (10th) day of February, 1870.

CHARLES J. TORBUT,
Notary Public in and for Sacramento Co., Cal.

OFFICE OF THE CENTRAL PACIFIC RAILROAD CO. OF CALIFORNIA,
Sacramento, February 10th, 1870.

STATEMENT of the City and County Taxes Paid by the Central Pacific Railroad Company of California to Cities and Counties of the State of Nevada, for the year 1869:

To Washoe County		$19,691 67
" Elko	"	38,885 54
" Humboldt	"	35,199 92
" Churchill	"	8,672 67
" Lander	"	18,300 00
Total,		$120,749 80

E. H. MILLER, JR.,
Secretary.

STATE OF CALIFORNIA,
County of Sacramento.

E. H. Miller, Jr., being duly sworn, says, that he is the Secretary of the Central Pacific Railroad Company of California, that the foregoing statement of

taxes paid by said Company to Cities and Counties of the State of Nevada for the year 1869 is true, and that the same were paid in gold coin.

E. H. MILLER, Jr.

Subscribed and sworn to before me this tenth (10th) day of February, A. D., 1870.

CHARLES J. TORBUT,

Notary Public in and for Sacramento County, State of California.

OFFICE OF THE WESTERN PACIFIC RAILROAD COMPANY,
Sacramento, February 10th, 1870.

***STATEMENT** of City and County Taxes paid by the Western Pacific Railroad Company, for the year* 1869:

To	City of San Jose	$78 00
"	County of Santa Clara	1,364 68
"	" Alameda	1,739 40
"	" San Joaquin	4,847 00
"	" Sacramento	5,759 46
	Total	$13,788 54

E. H. MILLER, Jr.,
Secretary.

STATE OF CALIFORNIA,
County of Sacramento.

E. H. Miller, Jr., being duly sworn, says, that he is the Secretary of the Western Pacific Railroad Company, that the foregoing statement of the City and County taxes paid by said Company for the year 1869 is true, and that the same were paid in gold coin.

E. H. MILLER, Jr.

Subscribed and sworn to before me this tenth (10th) day of February, A. D., 1870.

CHARLES J. TORBUT,

Notary Public in and for Sacramento County, State of California.